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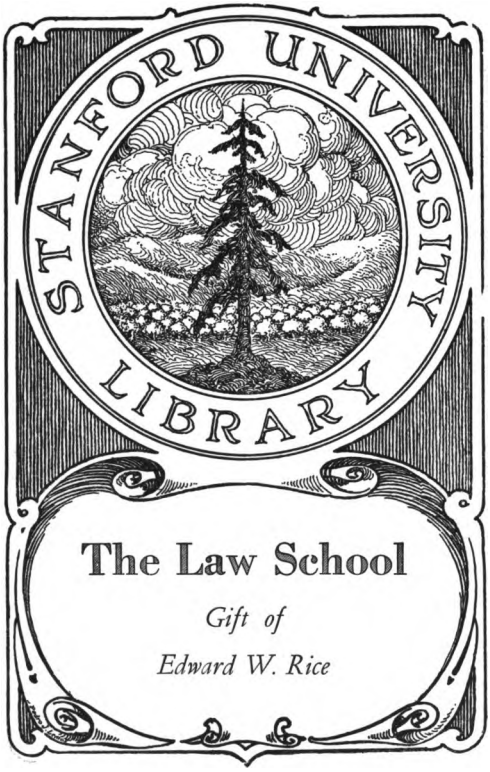

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THE

WESTERN AUSTRALIAN

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1901.

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JUDGES & LAW OFFICERS

OF THE

Supreme Court of Western Australia.

(1901).

Chief Justice:

EDWARD ALBERT STONE, Esq.

Puisne Judges:

ALFRED PEACH HENSMAN, Esq.

R. W. PENNEFATHER, Esq.

Attorney General:

GEORGE LEAKE, Esq., K.C.

Master of the Court:

FRANCIS ARNOLD MOSELEY, Esq.

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CASES

DETERMINED BY THE

FULL COURT OF WESTERN AUSTRALIA.

REX *v.* DEBAUN.

1901.

April 22.

THE C. J.
Hensman, J.

*Criminal Law—Lottery—*10 *and* 11 *Wm.* 3, *Ch.* 17, *Sec.* 1 (*Imperial Act*)—*The Police Act*, 55 *Vic.*, *No.* 27, *Sec.* 93—*The Police Amendment Act*, 56 *Vic.*, *No.* 10, *Sec.* 3, *and Secs.* 11 *to* 13—*The Constitution Act*, 52 *Vic.*, *No.* 23, *Sec.* 57.

The Imperial Stat., 10 and 11 Wm. 3, Ch. 17, Section 1, is in force in W.A., and by that Section the keeping or setting up of a Lottery is made a public nuisance, and is punishable as such; and as Sec. 93 of the Police Act dealt only with the mode of recovering penalties, it is not a variation or repeal by implication of Section 1 of 10 and 11 Wm. 3, Ch. 17. Sec. 93, however, operates as a repeal of Section 2 of 10 and 11 Wm. 3, Ch. 17. The subsequent repeal of Section 93 does not revive the repealed portion of 10 and 11 Wm. 3, Ch. 17. Sec. 57 of 52 Vic., No. 23 (Constitution Act) is merely declaratory of the common law, and therefore all the laws of England in force at the time of the arrival of the first settlers in the Colony, and which are applicable to the conditions of an infant colony, must from the outset become and continue to be the law of the Colony until by its own Legislature it proceeds to shape, modify, or abrogate the existing law, so as to adopt it to its own circumstances and situation.

Per Hensman, J. Even if 10 and 11 Wm. 3, Ch. 17, is not in force, the keeping, etc., of a Lottery is a misdemeanour at common law, and is therefore indictable.

THE defendant was, at the December Criminal Sittings of the Supreme Court, charged with keeping and setting up a Lottery on the 9th day of January, 1900, and on divers days and times between that day and the 17th day of March, 1900.

Counsel for the accused, before pleading to the charge, moved to quash the information on the several grounds set out in the case stated, hereinafter referred to.

It was admitted by the Crown that the accused had voluntarily closed the Lottery and had not since opened or kept the same for some two months before the Police Court proceedings upon which the information was founded, were taken.

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After hearing argument the Chief Justice suggested that as the accused admitted the keeping, etc., of the Lottery he should plead guilty, and he (the Chief Justice) would reserve all the points taken by his Counsel for the opinion of the Full Court.

The plea of guilty having been entered, the following were the questions submitted on a case stated by the Chief Justice for the opinion of the Full Court, namely :—

1. Do the facts charged in the said information amount to an offence punishable by law ?

2. Are the Imperial Lottery Acts in force in the State of Western Australia ?

3. If the said Lottery Acts or any of them were at any time in force in Western Australia, had they ceased to continue in force after the 18th day of March, 1892 ? (*a*) By repeal direct or by implication. (*b*) By reason of the same or each of them being varied by the Legislature of Western Australia.

4. If the said Lottery Acts are in force in the State, is the information bad in law ? (*a*) By reason of the fact that it was found on an information laid by a private prosecutor, and are the proceedings thereon irregular and void as being in direct contravention of the Imp. Act, 45 Geo. 3, Ch. 143, Sec. 59 ? (*b*) By reason of the fact that the information was for an alleged offence which, if it had existed, had ceased to exist, and had been absolutely abated two months before the taking of the inquisition or other proceedings upon which the appellant was committed for trial. (*c*) By reason of the fact that the Imperial Lottery Acts do not contemplate the proceeding against, and punishment of, any person who has set up or kept a lottery at a remote period, so as to be a public nuisance within the Act, the setting up and keeping thereof having to exist *in presenti*, namely, at or immediately before the inquisition, in other words, "that at the time of, or immediately before the taking of the inquisition there existed a public nuisance that required to be abated."

Villeneuve Smith (with him *Hensman*), for the defendant, appellant :

1. Assuming 10 and 11 Wm. 3, Ch. 17, was in force in Western Australia, it had been repealed (*a*) by implication, (*b*) by having been varied by the local Legislature.

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Section 93 of the Police Act repealed or varied the law relating to Lotteries as it existed at the time of the passing of the Constitution Act (W.A.), 52 Vic., No. 23, Sec. 57.

The Imperial Act was passed (*a*) For supervision of Lotteries, and made them a common nuisance; (*b*) Fixed a penalty of £500; (*c*) The offender to be proceeded against as a rogue and vagabond; (*d*) Penalty went to Crown; (*e*) No appeal was given.

The local Act was passed for prohibition of Lotteries, (*a*) Penalty, £200 in discretion of Justices for first offence; (*b*) For second offence penalty, imprisonment (imperative), not exceeding 6 months, and fine not exceeding £200; (*c*) Penalty goes to His Majesty, except so much as may be given to informer; (*d*) A right of appeal is given.

This shews a variation of the Imperial Statute by local legislation, and under the Constitution Act Section 57, as soon as Section 93 of Police Act became law 10 and 11 Wm. 3, Ch. 17, ceased to exist. *Fortescue* v. *St. Matthew, Bethnal Green* (*a*), *Michell* v. *Brown* (*b*).

The Colonial Legislature, therefore, by passing Section 93 of the Police Act, intended to deal with the question of lotteries generally. The Colonial Legislature considered such a measure necessary in the then state of society in the Colony (1892), and they therefore proceeded to shape and modify the law as it then existed, so as to adopt it to their own circumstances and situation, and thereupon the Imperial Act ceased to exist. *Attorney-General* v. *Stewart* (*c*,) *Cooper* v. *Stuart* (*d*).

Section 93 is practically a repeal by implication of the Imperial Act.

Applying the words used by Charles, J., at p. 177 in *Fortescue* v. *St. Matthew, Bethnal Green*, to the present case, "it cannot be denied that both these Acts (*i.e.*, 10 and 11 Wm. 3, Ch. 17, and 55 Vic., No. 27, Sec. 93) cover the offence with which De Baun is charged, but the Western Australian Act differs from the Imperial Act, both as to the amount of the penalties which may be imposed, and as to the conditions under which these may be recovered. Again, a right of appeal is given in the Colonial, and none in the Imperial

(*a*) 1891 2 Q.B., 170.
(*b*) I. E. & E., 267.
(*c*) 16 R.R., p.p. 166 and 7.
(*d*) 14 App. Cas. 286.

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Act. Again, in the Imperial Act the penalty is a fixed and imperative one of £500. In the Colonial Act the Justices have a discretion up to £200.

Fortescue v. *St. Matthew, Bethnal Green*, and *Michell* v. *Brown*, are directly in point, and therefore the Police Act, Section 93, operates as a repeal of the Imperial Act, and in Section 57 of the Constitution Act the Legislature must be taken to have intended to vary the law.

The intention of Section 57 of the Constitution Act is that the law is to continue in force until repealed or varied by local legislation, or, in other words, so soon as the Colonial Legislature proceed to modify, abrogate, or vary the law as it existed at the time of the proclamation of the Constitution Act, then such law shall cease to exist. *Cooper* v. *Stuart*, p. 291.

Unless an Imperial Statute has been by legislative enactment adopted, there is no necessity for express words to repeal it, and therefore Imperial Statutes, which are simply the law of the Colony by reason of the fact that the first settlers brought the English laws which were applicable with them, cease to apply so soon as the Colonial Legislature passes laws dealing with the same subject. *Cooper* v. *Stuart*, p. 291, *Attorney-General* v. *Stewart*, p. 166.

The subsequent repeal of Section 93 of the Police Act does not revive the Act of William, as the Shortening Ordinance Act, 46 Vic., No. 11, enacts "that repealed Ordinances are not to be revived on the Act repealing them being itself repealed."

2. 10 and 11 Wm. 3, Ch. 17, is not applicable to Western Australia. It is purely local to England and Wales. The object is political, it having grown out of local circumstances, namely, the abuse of the Great Seal of England. The Act was not applicable to the conditions of an infant colony, and therefore did not become the law of the colony. *Attorney-General* v. *Stewart*, p. 162. Its operation was limited to England and Wales. It did not extend to Ireland, Scotland, or the Colonies. *Attorney-General* v. *Stewart*, p. 165, *Cooper* v. *Stuart*, p. 286. The Act of William is a penal Act, and therefore does not go with the subject. *Cooper v. Stuart*, p. 291, *Clarke's Colonial Law*, p. 8.

3. The Attorney-General only can institute proceedings

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under 10 and 11 Wm. 3, Ch. 17. *Rex* v. *Tudenham* (*a*), *Taylor* v. *Smeaton* (*b*).

4. The nuisance had ceased to exist two months before the Police Court proceedings. The words of the Act are "*keeping and setting up*." This is a present offence, and must have existed at or immediately before proceedings taken. The proceeding is for the removal or abatement of the nuisance—the Court will do nothing in vain. How can they proceed to remove or abate a nuisance that does not exist? The intention of the Act is clear, otherwise a man could be prosecuted for having kept or set up a Lottery, *e.g.*, five years ago. *Roscoe*, p. 826, *R.* v. *Incledon*, 12 R.R. 313, *Arch. Crim. Pleading*, p. 103.

E. A. Harney (with him *Wood*), for the Crown, contra.

As to the Imperial Act 10 and 11 Wm. 3, not being applicable in this State, the Common Law established by prescription, and the Statutory Law together make up the body of the English law at any given date.

When England conquers a country or obtains a cession of a country having already a code of laws, the English law does not follow English settlement of necessity. But when England colonises an uninhabited country the law then in force in England attaches to the residence of the Colony. Colonisation is not the acquisition of new country, but the enlargement of the area of British jurisdiction. It is not a conflict between two systems of jurisprudence, but the extension of British jurisprudence to a region where there was none before. Hence there was really no necessity for a Statutory Constitution for Western Australia. *Mayor of Lyons* v. *East India Company* (*c*).

Section 57 of 52 Vic., No 23, (Constitution Act) is merely declaratory of the Common Law, and, therefore, all the laws of England in force at the time of the arrival of the first settlers in the Colony, and which are applicable to the conditions of an infant Colony must, from the outset, become and continue to be the law of the Colony until by its own Legislature it proceeds to shape, modify or abrogate the existing law so as to adopt it to its own circumstances and situation.

The Supreme Court Act, 24 Vic., No. 15, Sec. 4, makes all

(*a*) 10 L.J., M.C. 163. (*b*) 11 Q.B. 207.
(*c*) 1, Moore's P.C. Reports, p. 272.

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English Acts prior to 1829 applicable, as regards procedure, to Western Australia.

Section 93 does not cover all the ground of the Act of William.

No repeal by implication can exist if there is no contradiction in both Acts existing side by side.

The Act of William is to make lotteries indictable as public nuisances. Section 93 renders summarily punishable the keeping of a lottery. It does not, therefore, make it cease to be a Statutory nuisance, but it provides a summary concurrent remedy. In effect it says to the Crown, henceforth you can exercise your discretion by proceeding against the Lottery holder for a nuisance by indictment or by punishing him under the Statutory provision of the Police Act.

This is shown, first, by the proviso at the end of the Section excluding from the remedy there given, other remedies then or thereafter to become law. Secondly by the analogy of other cases—before the establishment of Pettty Sessions jurisdiction, all punishable offences had to be dealt with by indictment, and the summary jurisdiction added, and did not substitute the remedy in any of the cases. Thus the Sorcery Act, 20 Vic., No. 5, gave a concurrent summary jurisdiction where the amount was under £5, without in any degree abrogating the procedure by indictment. Thirdly, in New South Wales where the provisions as to the transference of English law are identical, it has been held that the "Little Goes" Act, 42 George 3, is applicable there notwithstanding that New South Wales has a general local act dealing with such matters.

Although New South Wales has no Constitution Act, its Supreme Court Act is identical with ours, being the sole incorporating medium, and it has been held that the English Lotteries Act applies, notwithstanding that lotteries are specially dealt with by 39 Vic., No. 28. Moreover, our Constitution Act is a work of supererogation and leaves untouched the general principles of the *Lex Loci*. *R.* v. *Ah Tow* (*a*), *Attorney General* v. *Edgely* (*b*).

Finally, even if 10 and 11 Wm. 3, Ch. 17, is not in force here, the keeping, etc., of a lottery is a misdemeanour at common law, and is, therefore, indictable.

(*a*) 7 N.S.W.L.R., 347 (*b*) 9 N.S.W.L.R., 157

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As to an indictment under 10 and 11 Wm. 3, not lying for a nuisance already abated, although the indictment under the Act of William is for a nuisance, the nuisance need not exist at the time of the indictment, because the Act of William provides for the abatement of the nuisance as well as for the punishment of the offence, and by Section 2 it provides even a summary remedy by fine. *R.* v. *Crawshaw* (*a*), *R.* v. *Stead* (*b*), *R.* v. *Pattendorf* (*c*).

The objection taken that the proceedings should be taken by the Attorney-General, and should not be instituted by indictment, only applies to the recovery of penalties, as is seen from Section 59 of 46 Geo. 3, Ch. 148.

Villeneuve Smith, in reply. Section 4 of 24 Vic., No. 15, refers to the laws regulating the administration of justice, and not to the general law of the State. *Whicker* v. *Hume* (*d*), *Attorney-General* v. *Edgley* (*e*) is not in point, and if it were it is not good law, as it conflicts with *Whicker* v. *Hume*, and the latter case does not appear to have been cited in Edgley's case.

Cur. adv. vult.

THE CHIEF JUSTICE. This is a case stated by me for the opinion of this Court upon the somewhat important and rather difficult points of law raised by counsel for the defendant on the hearing of an information against the defendant, charged with keeping a lottery. The various points of law are set out in the special case, together with the questions which this Court is asked to decide. The various points were very fully argued before us by Mr. Smith, and they are of considerable interest, as one of them involves the question as to whether the Imperial Lottery Acts are in force in this State or not. The first question put to the Court is, "Do the facts charged in the said information amount to an offence punishable by law?" The information contained three counts, but I need only read the first, which charged the defendant, that he did, on the 9th day of January, 1900, and upon divers other days and times between that day and the 17th day of March, 1900, at Perth in the said State, unlawfully set up a certain lottery to the great damage and common nuisance of all the liege subjects of our Lady the Queen inhabiting and residing,

(*a*) 30 L.T.M.C. 58.
(*b*) 8 T.R. 142.
(*c*) I. Strange 686.
(*d*) 7 H.L. Cases 124, and at p.p. 151-2.
(*e*) 9 N.S.W.L.R., p 157.

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and to the evil example of all others in the like case offending. Now, whether the information discloses an offence punishable in law depends upon the question of whether the Imperial Act of Parliament known as the Lotteries Act 10 and 11 Wm. 3, Ch. 17 is in force in this State, and consequently, if it is in force, whether it has been repealed by implication or otherwise by the 93rd Section of the Police Act of 1892. Upon the point of whether the Act of William III is in force in this State, we must first look at that Act, the first section of which recites that several evil disposed persons for divers years last past have set up many mischievous and unlawful games, not only in London, but in most of the eminent towns and places in England and the dominion of Wales; and it was by that Statute enacted that all such lotteries were to be deemed common nuisances. Under that Section the defendant was informed against, and the law with regard to the question of whether that Act is in force in this State or not, seems to have been decided in the case of *Cooper* v. *Stuart* (*a*). Lord Watson in giving judgment in that case said, "The extent to which English law is introduced into a British Colony, and the manner of its introduction must necessarily vary according to the circumstances. There is a great difference between a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consists of a tract of territory practically unoccupied without settled inhabitants or settled law at the time it was annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament may by Statute, declare what parts of the Common or Statute law of England shall have effect within its limit. But when it is not done, the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail until it is abrogated either by ordinance or Statute." It is to that class of Colony that his Lordship referred. The learned Judge in the course of his judgment also quoted the well-known observations of Sir William Blackstone to the effect that such colonists carry with them only so much of the English law as

(*a*) 14 App. Cas., 286.

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is applicable to the conditions of an infant Colony; such, for instance, as the general rules of inheritance and protection from personal injury. In a previous case, *The Attorney General* v. *Stewart*, tried in 1817, a question was raised as to whether the law of mortmain was in force in the colony of Granada. In that case Sir William Grant said the question of whether the Statute of mortmain was in force in the colony of Granada depended upon the consideration of whether it was a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed. The effect of the same Statute was discussed in reference to the State of New South Wales where a similar point was raised, and the House of Lords held that the general principles laid down by Sir William Grant in the case of the *Attorney General* v. *Stewart* were entirely correct and governed the case. In another case tried in 1875 before the Privy Council, the question of the English law as regards perpetuities was discussed in its relation to the colony of Penang, and the Privy Council held that the English law extended to that settlement upon circumstances of public policy.

Now when I was sitting in the Criminal Court I was inclined to agree with the view placed before me by Mr. Smith, that it could hardly be held that such an Act as 10 and 11 Wm. 3, could apply to the circumstances of an infant colony just settled by a handful of inhabitants; but upon further consideration and review of the cases, it seems to me that one has to consider whether that Act was passed simply as a matter of local policy, or whether for public policy—whether it was an Act dealing with the morals of the community in general, or only dealing with a particular section of the community. I am of opinion, from the wording of the Act, that it was clearly intended to deal generally with the subjects of the Sovereign, and to prevent these unlawful games called lotteries being continued, and that it expressly enacted that these lotteries should be declared and become public nuisances. To my mind it is impossible to draw a distinction with regard to the effect of such conduct upon a large community or upon a small community; the effects in either case must be evil and must produce evil consequences. It matters not whether a small number of people gamble, or a large number, the result being the

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same in each case. It therefore follows that, when this State was first settled by a small number of people, it would have been equally injurious to that small number that they should be permitted to indulge in gambling as it would have been to the large number of people inhabiting England when the Statute was passed. I am therefore of opinion with regard to that question that the Act of William III. was brought to the State by the people upon the first settlement of this country.

Unfortunately this does not settle the case. There is a further question, that even if that Act is in force here, and was brought here by the early settlers and was law upon the settlement of the State, whether that Act was repealed by implication by the 93rd Section of the Police Act of 1892. That Section has since been repealed by the Police Amendment Act 1893, and a very unfortunate mistake seems to have been made in the Section and Sub-sections which were passed, and which were evidently intended to take the place of Section 93 of the Act of 1892, because these Sections seem to me only to provide against the advertisement of lotteries, but do not make them illegal; so that if the Imperial Act was not in force there would be no Act in this State making lotteries illegal. Now in the Imperial Act provision is subsequently made. The first Section provides that lotteries are to be public and common nuisances, the second Section prohibits the keeping of lotteries, and provides a summary remedy for recovering penalties cast by that Section upon anyone infringing the Act. It is true that by that Section, and by a subsequent Act, 46 Geo. III., Cap. 148, all the penalties are to be recovered in the name of the Attorney-General; but notwithstanding that the Section does provide a summary remedy against persons infringing that Section. Now Section 2 of the Imperial Act did not come into operation until after Section 1, which made lotteries a common and public nuisance; being declared common nuisances they became indictable as misdemeanours, and so we find the Legislature making provision for the punishment of people keeping lotteries by enacting that they could be indicted as for a misdemeanour for that offence, and we find them making provisions for a summary procedure by which a penalty of £500 could be recovered in the name of the Attorney-General, and also providing that persons so offending might be prosecuted as common rogues by the Statute in such case made

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and provided. I say that the second Section of the Imperial Act did not come into operation until after the first Section, because the second Section is worded in this way, "and from and after the 29th day of December 1699 no person or persons shall publicly or privately . . . . keep . . . . a lottery." The previous Section was passed in 1698, so it would appear that there is really no distinction between a case where the first Section had been passed in one Statute and the second Section passed in a subsequent Statute. It has never been held in such a case that the second Section by implication repealed the first Section because it made provision for a summary remedy, when the first Section made provision for an indictment; and therefore I do not see how it can be held that Section 93 of the Police Act, 1892, repealed by implication the first Section of the Imperial Statute. The 93rd Section of the Police Act merely made provision for the recovery of a penalty of £200, and made provision that for a second offence the offending party should be liable to imprisonment for three months; but it will be observed that the Second Section of the Imperial Act makes a somewhat similar provision, in that it makes provision for the recovery of a penalty of £500, and declares that the party offending shall be liable to be prosecuted as a common rogue, and will be liable to a term of imprisonment for three months. Therefore in that respect there is little difference between the effect of the two Statutes. The only question that has ever been raised with regard to the bearing of the second Section of the Imperial Statute upon the first Section was with regard to whether a person keeping a lottery could be indicted for a misdemeanour or nuisance, but that question was set at rest in the case of *Regina* v. *Crawshaw*, reported in *Bell's Crown Cases Reserved*, p. 303. The information in that case contained several counts framed under the Statute 10 and 11 William III. for keeping a lottery, and the objection was taken that the information was bad because the proceedings should have been taken under the second Section for the recovery of the penalty; but those objections were over-ruled, and Earle, C. J., in the course of his judgment, said he found a principle did prevail that when the Legislature declares an act to be a public nuisance the person doing the act is indictable, and he therefore held that counts framed under the Lotteries Act are not bad, and that the defendant was indictable. The learned Judge referred to what he termed the powerful argument of Dr. Wheeler during the case, but the learned

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counsel in the course of his argument was obliged to admit that if the provisions of the Act were cumulative then he had no *locus standi*. Now it seems to me that the question arises upon this point, whether the provisions of the Police Act were intended to be cumulative upon the provisions of the first Section of the Imperial Act, and upon consideration I think they are clearly so, and that the Police Act does not in any way attempt to interfere with the provision of the Imperial Act, which makes lotteries common and public nuisances, but simply provides for a more summary remedy for the recovery of a penalty, and for the punishment of a second offence. There is to my mind nothing inconsistent in the first Section of the Imperial Act standing alongside the Section of the Police Act; in other words, had the Section of the Imperial Act been embodied in the Police Act, I do not see why they should not have stood together, in the same way as the first and second Sections stand together in the Imperial Act for making similar provisions to those made in the Police Act. I am therefore of opinion that the 93rd Section of the Police Act of 1892 did not repeal the first Section of the Imperial Act. Then there is another point, that if the Imperial Act is in force in this State and not repealed by implication, that the preliminary proceedings should have been taken by the Attorney-General pursuant to the Act 46 Geo. III. The information filed against the defendant was not an information to recover penalties under the Statute, but was an information for the misdemeanour of committing a public nuisance, and therefore the ordinary procedure obtains that anyone can lay an information for a misdemeanour unless prevented by the provisions of the Statute creating the offence. There is nothing in the Statute requiring that the Attorney-General should lay the information, and indeed, from the cases that have occurred times without number in England, the Grand Jury have found a true bill in cases of indictment for nuisances, and the proceedings have not been taken by the Attorney-General. The only proceedings that have been taken by the Attorney-General have been where there has been an effort to recover the penalty for an infringement of the second Section of the Act; but as the Section of the Police Act would appear to substitute the procedure in the Police Act for that of the Imperial Act, it would appear that any person could proceed for the recovery of a penalty under that Statute. In any event there is nothing in connection with the information laid

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against the defendant which requires that the preliminary proceedings in such an action should be taken by the Attorney-General. The fourth point raised was that there must be a continuing offence in order to make a person liable under the Statute, and that, as in this case the defendant had ceased to keep a lottery at the time the proceedings were taken against him in the Police Court, all subsequent proceedings were wrong. Upon that point I am also unable to agree with the learned counsel. One has only to look to the form of the indictment for similar offences to ascertain that it is not necessary that the lottery should be continued up to the time of the laying of the preliminary information before the Magistrate. It is an offence to keep a lottery, and the person so doing is guilty of a misdemeanour under the Imperial Statute in force here, and he can be proceeded against at any time. If this were not so one can see how the Act would become a dead letter, because all a party would have to do who is keeping a lottery, when he finds that proceedings are about to be taken against him, would be to discontinue holding his lottery and so escape punishment. I am of opinion that the fact of the defendant having ceased to hold lotteries would not relieve him of his liability to be proceeded against for an infringement of the Act, although it might be a matter to be considered in awarding the punishment. My answers to the questions are as follows:—(1) Do the facts charged in the said information amount to an offence punishable by law? My answer is "Yes." (2) Are the Imperial Lottery Acts in force in the State of Western Australia?—To that I give a qualified answer, that the first Section of the Imperial Act 10 and 11, William III., Cap. 17, under which the defendant was informed against is in force in this State. (3) If the said Lottery Acts, or any of them, were at any time in force in Western Australia, had they ceased to continue in force after the 18th day of March, 1892? I will answer each sub-Section of that question as follows:—(*a*) By repeal direct or by implication?—My answer is, so far as relates to Section 1 of 10 and 11 Wm. 3, Cap. 17, "No." (*b*) By reason of the same or each of them being varied by the Legislature of Western Australia?—My answer is, so far as it relates to the same Section, "No." (4) I answer in the negative.

HENSMAN, J. I am of the same opinion. The preamble of the

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Act of William III. says: "Whereas several evil-disposed persons for divers years last past have set up many mischievous and unlawful games" . . . . "to the reproach of the English laws . . . . for the remedy whereof be it enacted . . . . that all such lotteries are common and public nuisances, and that all grants, patents and licenses for such lotteries, or any other lotteries, are void and against law." I do not think that the Courts in England have ever given a decision as to whether this Act created a nuisance, or whether it was merely declaratory of the common law. If it were necessary to give an opinion, I should, failing any authority to the contrary, decide that it was only declaratory of the common law. What is it that constitutes a common nuisance? I do not profess to give any exhaustive definition, but speaking generally, nuisances are practices which produce hurt or damage to the general well-being of the community. Russell in his work on Crimes, treating of nuisances, gives various examples, amongst which he mentions gaming, which is detrimental to the public, as it promotes cheating, idleness, and other bad practices. But whether the keeping of a lottery is an offence at common law, or whether it was created by the Statute, it is not disputed that, when this State was founded, the keeping of a lottery was a common nuisance according to the law of England. The first question we have to consider is, did the early colonists bring this law with them? The State was acquired by occupancy, and, therefore, by the well-known rule, there being no law here, the colonists brought with them on their arrival all the laws of England which were applicable to their new condition. It has been argued that the keeping of a lottery is illegal in England and Wales only, for some local reasons, and that the law on that subject has not a general application. Human nature, however, is the same here as elsewhere: the vice of gambling is as likely to be practised as largely here as it is in any other portion of the globe, and I feel sure that no person who desires the well being of the community will deny that it is most desirable that such a practice should be suppressed, if possible, as being injurious to the well being of the community. Being of opinion that the law of England with regard to lotteries came to this State upon its occupancy, I would point out that one of the remedies given by the Act is to proceed against the person offending by indictment or information. The Act is divisible. There are three remedies, the Common Law remedy,

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by which the offence is to be tried by a jury as a common nuisance; secondly, an action for a penalty; and thirdly, a summary proceeding before the Magistrate, by treating the party as a rogue and vagabond. These remedies are cumulative, they could all exist together, and in fact did exist together. One object of an indictment for a nuisance is to abate the nuisance, which can be carried out by force, if necessary, as in the case of a nuisance committed on a highway. If the summary jurisdiction under the Statute had been availed of, and the party had been tried as a rogue or vagabond, no doubt that would be borne in mind by the Court, in case there should afterwards be an indictment before a jury. That being the state of the law in this State in 1892, the Police Act was passed, the 93rd Section of which enables two justices to inflict a penalty of fine or imprisonment upon any one found guilty of keeping a lottery. It has been contended that the law, as stated in 10 and 11 William III., has by implication been repealed by the Act of 1892. It is clear that there has been no express repeal, and we must consider, therefore, what is the meaning of a repeal by implication. A repeal by implication occurs when the latter Act is so inconsistent with or repugnant to the former Act that the two cannot stand together. In dealing with this question Sir Peter Maxwell, in his book on the interpretation of Statutes, uses these words:—"Repeal by implication is not favoured . . . . An Act ought not to be held to be repealed by implication without strong reason . . . . It is a reasonable presumption that the Legislature do not intend to keep contradictory Acts in the Legislature without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it is inevitable." Now, are these Acts so inconsistent or repugnant that they cannot stand together? I certainly think not. The common law procedure existed in the Statute of William III., together with the procedure for a penalty, and the summary procedure. It has been held in the case of *The King* v. *Carlisle* (*a*) that the Statute 9 and 10 William III., Cap. 32, has not altered the common law as to the offence of blasphemy, but it has given a cumulative punishment. It is therefore still an offence at the common law to publish a blasphemous libel. In that case Abbot, C.J., in the course of his judgment, said: "Now I take it to be a general rule that where there is a misdemeanour at common law, a Statute providing a

(*a*) 3 B. & Ald. 161.

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particular punishment for it does not repeal the common law;" and the rule laid down by Lord Mansfield, in the case of *Rex* v. *Robinson*, is this, that where a Statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy for such new offence (not antecedentally unlawful) by a particular sanction and particular method of proceedings, that particular method of proceeding must be pursued, and no other. But where the offence is antecedentally punishable by common law proceedings, and a Statute prescribes a particular remedy by a summary proceeding, there either method may be pursued, and the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the Statute; because there the sanction is cumulative, and does not exclude the common law punishment. Again, in the case of *The King* v. *Gregory* (*a*) which dealt with the Act of Parliament providing a summary remedy against persons obstructing the highway, it was held that the party who continued building contrary to the Act might be indicted for a nuisance; and in the course of his judgment Taunton, L.J., said, in answer to the objection, that this was not an indictable offence, that as the Statute declared the offence to be a common nuisance, it was, as such, indictable. Now it is only right that I should refer to the cases which were quoted by the learned counsel for the defendant. Mr. Smith laid great stress on the cases of *Mitchell* v. *Brown* (*b*), and *Fortescue* v. *the Vestry of St. Matthew, Bethnal Green* (*c*). Since the argument I have looked carefully into the cases, but I cannot see that they affect the principle which binds this Court in its decision of this case. In those cases it was a question of whether a later Statute was inconsistent with or repugnant to a former Statute, and the Court came to the conclusion in both cases that they were. Lord Campbell, in the case of *Mitchell* v. *Brown*, says:—" If a later Statute again describes an offence created by a former Statute, and fixes a different punishment to it, varying the procedure, etc., giving an appeal where there was no appeal before, we think the prosecutor must proceed for the offence under the later Statute. If the later Statute expressly altered the quality of the offence, as by making it a misdemeanour instead of a felony, or *vice versa*, the offence could not be proceeded against under the earlier Statute, and the same

(*a*) 5 B. and Adol, p. 555. (*b*) 1 E. & E., 267.
(*c*) 1891 2 Q.B., 170.

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consequences seem to follow from altering the procedure and punishment; the later enactment operates by way of substitution, and not cumulatively, giving an option to the prosecutor or Magistrate." That does not appear to me to be inconsistent with the fact here, that the remedy was cumulative. Indeed, it appears in these cases that the Acts were so inconsistent that they could not stand together, so inconsistent in fact that a party would not be able to say under what Statute he should proceed. In the case of *Fortescue* v. *St. Matthew's Vestry*, Charles, L.J., who delivered the judgment of the Court, said:—"Indeed it cannot be denied that both these Sections cover the offence with which the appellant was charged." Here it is not so. Section 93 does not cover the offence at common law. His lordship continues: "But the later Statute differs from the earlier, both as to the amount of penalty which may be imposed and as to the conditions under which it may be recovered," and then he goes on to shew the difference between the two Acts, saying, "Again, in the earlier Act there may be an order to remove the obstruction forthwith; in the later Act he has so many days within which to remove the obstruction." That would shew a complete inconsistency between the two Acts, and I am therefore of opinion that these two cases do not affect our decision. It has been said further that if the only law in the Colony in 1892 was that contained in Section 93 of the Police Act, it would not be an offence to keep a lottery, because by the Interpretation Act of 1898, Section 5, it is enacted that where an Act passed after the 13th day of April, 1853, whether before or after the commencement of this Act, repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed unless words are inserted reviving that enactment. I am, however, of opinion that the common law remedy existed independently of the Statute remedy, and on this point I find on referring again to Sir Peter Maxwell, that it has not yet been decided as to whether or not that Section applies to repeal by implication. It is not, however, necessary to consider that here. In dealing with this Interpretation Act I may as well refer to Section 13, which enacts that where an act or omission constitutes an offence under two or more Acts, or both under one Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offenders shall not be liable to be punished twice for the same offence. I refer to this because I think it is desirable when we are considering

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these matters that we should be able to satisfy ourselves that justice has been done; and it would appear by this Statute that what was left to the discretion of the Magistrate was not the amount of the penalty, but that a man was not to be punished twice for the same offence. In conclusion, I desire to say that I think it is clear that the Legislature never intended to do away with the offence of keeping a lottery, because by Section 11 of the Police Act they have expressly enacted that where any letter, circular, telegram or advertisement is sent inviting any person to take any share, ticket or interest in a lottery, the person so offending shall be liable to be punished. Looking at that Section it would clearly be absurd if it were no offence to keep a lottery, and yet an offence to ask a person to take a ticket in one. As to the two other points, I agree with the learned Chief Justice. The necessity of having the Attorney-General take proceedings only applies to an action for a penalty. Here the Attorney-General filed the information, and the same principle applies as in England to such an act done by the grand jury. Again, with regard to the argument that the offence was not existing at the time of the information, I am of opinion that there is nothing in that contention, because there is a remedy. If the offence complained of is not continuing the punishment will be by fine or imprisonment; if it is continuing an order for abatement will be made. The conviction must be confirmed.

Conviction Confirmed.

Solicitor for Crown: *R. B. Burnside.*

Solicitors for Defendant: *Jones, Smith & Norris.*

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April 23.

REX *v.* HICKS.

EX PARTE WELSH.

The C. J.
Hensman, J.
Pennefather, J.

Goldfields Act, 1895—*Certiorari—Motion to quash return—Original order—Notes of evidence—Seal of Warden's Court—Return of documents not before Warden.*

A special case was stated by H., the Warden at Cue, for the opinion of a Judge of the Supreme Court under Section 62 of the Goldfields Act, 1895. The answers of the Judge were returned in due course to H. The relator W., being dissatisfied with the order of H. on the opinion of the Judge, obtained a *rule nisi* for a Writ of *Certiorari* returnable to the Full Court. H.'s order having been brought up to the Full Court, and the relator being dissatisfied with the return, obtained a further *rule nisi* to quash it on the ground that the original order of the Warden had not been returned, that a number of documents were included which had not been before the Warden's Court, and that the return was not under the Seal of the Court.

Held, on motion to make this rule absolute that it must be discharged.

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Pilkington shewed cause.

W. T. Forster, in support of the rule, cited *Palmer & Forsyth* (*a*) *Reg.* v. *Inhabitants of Abbergele* (*b*), contending that, as the original order was not before the Court, it was open to the defendants in the action to obtain a discharge of the rule on the ground of irregularity.

STONE, C.J. I am of opinion that this rule should be discharged. The objections taken by Mr. Forster are of a peculiarly technical character, but if I thought there was anything in them I should give effect to his argument. His first objection is that the Warden has not complied with the writ, which required him to return the order made by him in the proceedings before him, which have been the subject of the application for *certiorari*. Great stress has been laid by Mr. Forster upon the 61st Section of the Mines Regulation Act of 1895. Now, it seems to me that all that section does is to require a Warden, when he has given a decision, to enter that decision in the register, and to make an order in accordance with that decision, entering that order also in the register under the decision signed by him, but that no formal order or other record shall be necessary. The 61st Section does not make the order a formal order of the Warden, but simply directs what he is to do when he has given a decision, and provides that a copy of that order shall be admitted in all courts as conclusive evidence of that order having been made. It also enacts that no formal order shall be necessary. It does not go on to provide that the Warden may not make a more formal order than that which is recorded in the register. Again, I am of opinion that the 61st Section was intended to apply only to the case of complaints made before the Warden, namely, such complaints as are contemplated by the 56th Section of the Act, which requires the Warden to cause a register of complaints to be kept in the form of the second schedule. The proceedings in this case, however, were not in the nature of a complaint, as contemplated by the 56th Section, but it was an application for the registration of certain mining interests. The Warden heard that application, and came to certain conclusions upon the facts before him. He took notes of the evidence, and he made notes of his decision and of the conclusion he had come to upon that evidence. These notes of his decision do not form the formal order of the Warden, but are simply notes to guide him in

(*a*) 6 D. & R. 497. (*b*) 8 A. & D. 395.

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drawing up a formal order should it become necessary. It was quite competent for the Warden to abstain from drawing up a formal order on that decision until he found that he was obliged to determine the order that he had made. He appears to have done so upon notice that the rule had been granted for a *certiorari*, and he has returned in fact the order indicated by the notes taken by him on the proceedings before him. The writ in this case was not directed to the Warden to return the notes of the evidence or proceedings taken before him, but only to return the order made. Indeed, if the application had been made for a writ to return the proceedings, I do not know that such an order would have been granted, because it is unusual to require the Warden to return the depositions. With regard to the objection that the return included a number of documents which were not before the Warden, I do not think such an objection can be fatal to the return. The Court will not quash a return simply because the Magistrate or the Justices return more than they were required by the order to do, but will only regard those extra documents as mere surplusage. Of course the Warden must return the order applied for, because it is necessary to know what he has objected to, but I do not see how it can be objected to that he has sent something more than that which he was asked for. With regard to the seal, the Warden appears to have been out of his district when he made the return, and, the seal of his Court not being handy, he used the seal of the district in which he happened to be at the time. To my mind that was merely a mistake, although I do not think that the absence of the seal would be fatal to the return if the Magistrate has returned to this Court that which the Court demanded of him. The objection is too technical altogether to carry weight with me, and, having dealt with the other objections, it only remains for me to say that the rule must be discharged.

HENSMAN J. I am of the same opinion.

Rule discharged.

Solicitor for the Relator: *W. T. Forster.*

Solicitors for the Respondent: *James & Darbyshire.*

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CHRISTIE, PLAINTIFF (APPELLANT).

HARVEY & HAYWARD, DEFENDANTS (RESPONDENTS).

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April 23.

THE C. J.
Hensman, J.

Misrepresentation inducing Agreement—Findings of jury—Weight of evidence—New trial.

An action was brought by the plaintiff, claiming damages alleged to have been incurred in consequence of false representations made by the defendants, whereby the plaintiff was wrongfully induced to enter into an agreement with the defendants. The action was tried before the Chief Justice and a jury, and at the close of the evidence the Chief Justice non-suited the plaintiff as against the defendant Hayward, but allowed the case against the defendant Harvey to go to the jury. The findings of the jury upon the questions put to them by the Judge were (1) That the alleged misrepresentation was made by the defendant. (2) That it was false. (3) That it deceived the plaintiff. (4) That it was not made with the intention of deceiving. And (5) that it did not induce the plaintiff to enter into the agreement. Upon these findings judgment was entered for the defendant, and the plaintiff thereafter moved the Court for a new trial, on the ground that some of the findings were inconsistent, and that others were against the weight of evidence. The argument on the part of the appellant (in his Notice of Motion) was practically confined to the fourth ground thereof, viz., that the jury having found that the representation was made, that it was untrue, and that it deceived the plaintiff, there was no evidence to justify the further findings that the defendant Harvey had no intention to deceive, or that the representation was not an inducement, and that such findings were against evidence and the weight of evidence.

Held, That there must be a new trial, on the ground that the fourth and fifth findings of the jury were against the evidence and the weight of evidence, and were unreasonable and inconsistent with the other answers given to the questions put to them.

The facts of the case sufficiently appear from the judgments of the Court.

E. A. Harney (with him *Abbott*), for appellant, argued that a new trial should be granted.

Moorhead (with him *Hensman*), contra.

Harney replied.

STONE, C.J. I am of opinion that in the interests of justice this case should be tried again, and my brother is of a similar opinion. I do not propose to trench upon the rights of the parties upon a new trial by saying very much, nor do I think it necessary to go at any length into the evidence. The action was one for misrepresentation, which induced the plaintiff to enter into a certain agreement whereby he suffered loss. I gather from the notes of His Honor the Chief Justice, before whom this case was tried

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with a jury, that the parties agreed to confine the question before the jury to one issue, namely, as to whether there was or was not misrepresentation by Harvey as to the mortgage or mortgages on the property offered for sale; if the jury found there was misrepresentation the question of damages was to be referred to a referee to be appointed by the parties. I refer to this particularly, because from the pleadings it would appear that several issues were raised. The plaintiff is a surveyor, and the defendant the owner of a large tract of land at the Harvey, known as the Harvey Estate. It appears that the defendant was anxious to have that estate subdivided in order to dispose of it by sale; and that the plaintiff, being a person who had previously in another State had something to do with the subdivision of large estates, was interviewed by the defendant, with the result that, after certain representations had been made by him to the plaintiff, the parties entered into an agreement which is set out in the pleadings. The false representation alleged is that at the time of entering into the agreement the defendant stated to the plaintiff that the only encumbrance upon the land was one mortgage for £7,000, and that arrangements were made with the mortgagee whereby the defendant, on the payment of £2 per acre, could obtain a release of any portion sold; whereas there were two mortgages amounting to about £3,200 in addition to the £7,000 mortgage, and that no arrangement had been made as stated with the mortgagee. The plaintiff alleged that on the faith of these representations he went to considerable trouble and expense in carrying out the requirements of the agreement, and that the defendant wrongfully induced him by these false representations alleged. On the other side there are several other allegations with which I need not deal, but, generally, the defendant denied having made these false representations, or that the plaintiff was induced by any such representation to enter into the agreement alleged. The Chief Justice, in the course of his summing-up, seems to have directed the attention of the jury almost entirely to the question as to whether the defendant made the representation alleged, although the learned Judge incidentally touched upon the other questions upon which it was necessary the jury should find one way or the other. It was admitted, as was pointed out by the learned Judge that if the alleged representation was made by the defendant, then it was undoubtedly false, and there would be no occasion for the jury to discuss that question should they find that

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the alleged representation was made. Several questions were put to the jury, upon which they found—(1) That the alleged representation was made by the defendant. (2) That it was false. (3) That it deceived the plaintiff. (4) That it was not made with the intention of deceiving. (5) That it did not induce the plaintiff to enter into the agreement. Upon these findings judgment was entered for the defendant, and the plaintiff appealed against that judgment, applying to set it aside, and for a new trial upon the grounds stated in the notice of motion before us. Upon the appeal coming on, in consequence of some irregularities with regard to the notice of appeal as affecting the judgment entered, certain grounds of appeal were abandoned, and the points of appeal were confined, I think, to the fourth ground mentioned in the notice, namely, that the jury having found that the representation was made, that it was untrue, and that it deceived the plaintiff, there was no evidence to justify the further finding that the defendant Harvey had no intention to deceive, and that the representation was not an inducement, and that therefore the findings were against the evidence and the weight of evidence. The principal question, therefore, left to the jury was whether the representation alleged was made by the defendant or not. The jury found that it was made, and it followed as a matter of course that they found it was false; then they found that it deceived the plaintiff, but went on to find that it was not made with the intention of deceiving, nor did it induce the plaintiff to enter into the agreement. With regard to these two findings I am unable to agree with the decision of the jury, nor do I see how they could have arrived at such a finding when they had previously found that the representation was false, and that it deceived the plaintiff, because the representation was clearly an element of the consideration, and formed part of the inducement to the plaintiff to undertake the surveys which he agreed to carry out under the agreement. The plaintiff alleged that he pointed out to the defendant that when he was dealing with a large estate at Mildura there had been a difficulty with regard to the title, and that his efforts to dispose of the land failed in consequence of that defect in the title. He alleged that it was in consequence of that representation by him to the defendant that the defendant made the false statement with regard to the title alleged in the statement of claim, namely, that the mortgagee had agreed to lift the mortgage as and

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when £2 per acre of the land desired to be free should be paid to him. Now, if that representation was made and it was false, it is difficult to see how the jury could arrive at a conclusion that it was not made with the intention of deceiving the plaintiff, because it is difficult to see for what other purpose it could have been made. A man does not make a false statement knowing it to be false except with an object, and there was only one object which the defendant could possibly have had, and that was to deceive the plaintiff. If the plaintiff was deceived, as was found by the jury, in what way was he misled? It was argued that the plaintiff did not rely upon this false representation, but then, on the other hand, there is the plaintiff's evidence to the contrary, although there was certain evidence, given by Mr. Ash, with reference to a conversation between him and the plaintiff in respect to certain further encumbrances that were upon the property. Be that as it may, I think that evidence falls short of what was required, and that it cannot be used as an answer to or in explanation of the direct finding of the jury that the representation deceived the plaintiff. Then, did it induce the plaintiff to enter into the agreement? There again I think there must have been some confusion in the minds of the jury, and, after reading the very lengthy summing-up of the learned Chief Justice I am not surprised that the jury did not grasp quite clearly perhaps the direct issue upon which they had to find. I think they must have allowed some other incidents in connection with the evidence to have operated upon their minds when they came to the conclusion that it did not induce the plaintiff to enter into the agreement. If the plaintiff had known the true circumstances of the case, and had known that these additional incumbrances were upon the property, he would have been in a position to have exercised his own judgment as to whether he would enter into this agreement or not. For these reasons I think there should be a new trial, upon the ground that the two last findings of the jury were against the evidence and the weight of evidence.

HENSMAN, J. The statement of claim alleged that at the time a certain agreement was entered into the defendant made a false representation to the plaintiff, whereby he was wrongfully induced to enter into the agreement, and whereby he suffered damage. At the close of the plaintiff's case the Chief Justice non-suited the plaintiff, as against the defendant Hayward, and that not now being

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the subject of appeal, it is unnecessary that I should touch upon it. In answer to the questions the jury found that the alleged representation was made, that it was untrue, and that it deceived the plaintiff, but they also found that it was not made with the intention of deceiving the plaintiff, and that it did not induce the plaintiff to enter into the agreement. Upon those findings judgment was entered for the defendant. The question before us now is whether there ought to be a new trial upon the ground that some of the findings are inconsistent, and others are against the weight of evidence. In my opinion these findings cannot stand. As there will be a new trial it is not desirable that too much should be said now, in order that the jury may not be influenced at the next trial. As, however, the finding of the jury that the defendant made a false representation has not been challenged, this finding must be taken as correct, nor do I wish to suggest that it was not warranted by the evidence. That being so, in my opinion the finding that the false representation was not intended to deceive seems inconsistent and absurd. It appears to me from the evidence that the defendant must have known this statement to be false, but even if he made it, not knowing whether it was true or false, it is practically the same at law. If the defendant made this representation without intending to deceive the plaintiff, it is difficult to understand why it should have heen made. The jury further said that this representation did not induce the plaintiff to enter into this agreement. That to my mind is also against the weight of evidence, for these reasons—the representation, or the fact represented, was material to the contract, and it cannot be seriously contended that the plaintiff would have entered into the contract if he knew that he could not sell any of the land. I am always loath to interfere with the findings of a jury, but I think in this case the jury misunderstood some of the questions; at all events their answers to two of the questions are unreasonable and inconsistent with the other answers they gave to the questions before them. I am therefore of opinion that there should be a new trial, and that the costs of the former trial and this motion abide the result.

Mr. Hensman. The defendant non-suited will, I presume, be free from further action.

The Court: Yes. *Order for new trial.*

Solicitor for appellant: *F. A. Abbott*

Solicitors for defendant Harvey: *Nicholson & Hensman.*

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1901.

April 25.

The C. J.
Pennefather, J.

RALLA SINGH, Defendant (Appellant).
BISCHEN SINGH, Plaintiff (Respondent).

Local Court Act (27 *Vic., No.* 21) *—Arbitration—Excess of jurisdiction—Prohibition —Limited prohibition.*

In an action in the Local Court the plaintiff sued the defendant for £40 13s. 7d., the defendant counterclaiming for £52 7s. 3d. Exception having been taken by the plaintiff's solicitors to the jurisdiction of the Local Court, the matter was by verbal consent referred to an arbitrator. The arbitrator in his award stated that, as both claim and counterclaim were interwoven, he ignored the credits in both cases, and found for the plaintiff in the amount of £125 8s. 9d. with costs, and for the defendant on the counter claim in the amount of £112 with costs. The defendant then applied in Chambers for a prohibition against the Local Court Magistrate and the arbitrator, on the ground of excess of jurisdiction. The Judge in Chambers granted the prohibition, but limited it to the difference between the two judgments on the claim and the counterclaim on appeal against the order of the Judge in Chambers.

Held, that the Judge in Chambers had no power to limit the prohibition.

Downing, for appellant. The Judge had no power to grant a limited prohibition. When want of jurisdiction is patent the Court has no discretion, but must grant absolute prohibition. The want of jurisdiction was apparent on the face of the record.

Haynes, for respondent. Prohibition is an extraordinary power of the Court, and is only granted to prevent mischief being done. No such mischief has been done in this case.

Stone, C.J. It is very unfortunate that there should have been a miscarriage of justice in this small matter; the arbitrator seems here to have made a very great mistake in dealing with the case before him. He starts his award by asserting that the action was brought by the plaintiff to recover from the defendant a sum of £42 13s. 7d., balance of account for goods sold and delivered, and that the defendant in answer set up a counterclaim for £52 7s. 3d., yet in going into these accounts he comes to the conclusion that the defendant is indebted to the plaintiff in the sum of £125 8s. 9d., and that the plaintiff is indebted to the defendant in the sum of £112. Upon his finding judgment was entered up for these amounts, and the defendant, upon that award being entered up as a judgment, applied for prohibition, which was granted by the

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Judge in Chambers as to the sum of £13 8s. 9d., which amount the learned Judge arrived at by balancing the judgments one against the other. As we well know one does not hear these points so fully argued in Chambers as they are before the Court, and it therefore may not have appeared to the Judge in Chambers that he was really carrying the case further than it was before the order was made. The learned Judge made an order granting prohibition against the plaintiff in respect of an amount less the £13 balance between the two judgments. The principal point which suggests itself, to my mind, is that both the award and the judgment entered up shew that the arbitrator had no jurisdiction to give judgment for £135 for the plaintiff and for £112 for the defendant, because those amounts are outside the jurisdiction of the Local Court. It appears clear from the case of *Farquharson* v. *Morgan* (*a*) that where there is a want of jurisdiction shewn upon the face of the record the Court is bound to issue prohibition, and I think, on the authority of that case, we are bound to allow this prohibition to issue, because it is clear that there is a want of jurisdiction shewn upon the face of the record. Although I have the greatest respect for my brother Hensman's judgment, in this case I am sorry to say I must differ from the view he has taken in granting a limited prohibition. It is clear from the case I have just referred to that in that action there was ample room for a limited prohibition, because the award distinctly found in respect of some matters within the jurisdiction of the County Court, although some of the other matters were outside that jurisdiction. Here, however, it is impossible to dissever these judgments and say what part was within the jurisdiction of our Local Court and what outside the jurisdiction. The amount claimed was for goods sold and delivered, and was for an amount within the jurisdiction of the Local Court, but, unfortunately, the arbitrator chose to find for an amount which carried the case outside the jurisdiction of the Local Court, and I do not see how it is possible to separate any amount from the judgment now before us. It seems to me that if these judgments were to be interfered with it could only be done by the Court of Appeal upon a question of law. For these reasons I am of opinion that the appeal should be allowed.

PENNEFATHER, J. In this case I am of opinion a judgment was given by the Local Court which was manifestly in excess of its

(*a*) 1894 1 Q.B. 552

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RALLA SINGH v. BISCHEN SINGH.

jurisdiction, to support which it lies upon the party benefiting by that judgment to shew that it was brought within the jurisdiction by consent. The consent referred to in the Statute is without doubt a consent in writing, and must be signed by both parties. Upon this matter being referred to a Judge in Chambers the learned Judge seems to have been under the impression, that because there is a provision in the Act whereby one judgment may be set off against the other, that he was able to cure this excess of jurisdiction by doing that which should have been done in the Local Court. I am of opinion that the learned Judge had no power to exercise the functions of Judges of Appeal under these circumstances. The learned Counsel for the respondent has relied upon subsequent affidavits to prove a consent to this excess of jurisdiction, which, he says, are sufficient to satisfy the requirements of the Act dealing with excess of jurisdiction. I am of opinion that these affidavits do not bring the matter within the meaning of the Section, which says a written consent must be given and signed by both parties. In my opinion the whole case is outside the jurisdiction of the Court, and I do not think that the Judge, on being applied to for prohibition, should have separated the amounts unless it was clearly shewn to him which part of the judgment was in excess and which was not.

Appeal allowed.

Solicitors for appellant: *Ewing & Downing.*

Solicitors for respondent: *Haynes & Purkiss.*

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April 26.

The C. J. *Pennefather*, J.

NICHOLSON, PLAINTIFF (APPELLANT).

NEWMAN, DEFENDANT (RESPONDENT).

Bills of Sale Act—Apparent possession—Married Woman's Property Act.

In August, 1899, N., the husband of the plaintiff, bought a quantity of plants from the defendant, on the terms that they should be paid for in cash. N., intending to trade in these plants, placed them on land, of which he was lessee. N. did not pay for the goods, and in October assigned the goods and the lease to the plaintiff. The assignment recited that in 1894 N. was indebted to the plaintiff in Victoria in the sum of £650, and that he had given her security for the debt, by way of second mortgage over certain lands which he owned in Victoria, the mortgage securing the sum due and interest. The deed further recited that there had been default in payment of the debt due, and that the sum of £1000 was then due to the plaintiff, and that she was willing to accept the assignment of the lease of the premises, together with the furniture and the plants in satisfaction of the debt due. The instrument then assigned the lease, furniture and plants to the plaintiff, and released N. from the debt. The document was not registered under the Bills of Sale Act. In November the defendant pressed N. for payment, and N. gave him a promissory note for the

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amount due, but when giving the promissory note, said nothing about the assignment to the plaintiff. The promissory note was dishonored, and action brought by the defendant against N., to which there was no defence. Execution issued, and the Sherriff seized. The plaintiff claiming under the assignment, the Sheriff interpleaded. The Judge at *nisi prius* found that the goods, at the time they were seized, were in the possession or apparent possession of N., and that the assignment required registration as a Bill of Sale.

On Appeal.

Held, that the goods did not remain in the possession or apparent possession of N., and that the assignment did not require registration as a Bill of Sale. (*Ramsay* v, *Margrett* followed.)

Barsden, for appellant, relied on *Ramsay* v. *Margrett* (*a*).

Purkiss, for respondent. The document was a Bill of Sale within the meaning of the Act, and required registration. The goods at the time of the Sherriff's seizure were in the apparent possession of N., because he used the goods assigned in the same way as he did before the assignment.

STONE, J. The question raised in this appeal is whether a deed of assignment or bill of sale, made between Anna Maria Nicholson, the appellant, and her husband, whereby he assigned to her certain furniture and pot plants, is void against the execution creditor, the respondent. Now this question depends entirely upon whether this document required registration under the Bills of Sale Act. If the grantee, Anna Maria Nicholson, was in possession of the goods at the time they were seized by the Sherriff, then there was no occasion for the assignment to be registered. But if, at the time of the seizure by the Sheriff, they were in the possession or in the apparent possession of her husband, then the bill of sale would require registration, and would be void against the execution creditor. The case came before my brother Hensman upon an interpleader issue between the parties. There was not much evidence given, and the only point the learned judge determined was the question of possession, and he came to the conclusion upon the evidence that the goods were in the possession or in the apparent possession of the husband at the time of the seizure by the Sheriff; and that therefore the bill of sale or assignment set up by Anna Maria Nicholson was void, as against the execution creditor, who was therefore entitled to seize the goods. The case of *Ramsay* v. *Margrett*, which was cited during the case, in my opinion governs this question, and in the face of that decision I think the learned Judge in the Court below was in error. The

(*a*) 1894, 2 Q.B. 18.

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NICHOLSON v. NEWMAN.

learned Judge seems to have come to the conclusion after reading that case that certain remarks by the Master of the Rolls and Davey, L.J., were mere *obiter dicta*, and not judicial opinion. I am of opinion that the learned Judges in the case went so fully into the question upon that trial that their words must be looked upon as something more than a mere opinion. In that case the principal point raised was whether a written receipt given for the purchase money of the goods was an assurance within the Bills of Sale Act and required registration. Another point, however, was raised, namely, that if the receipt was a bill of sale within the meaning of the Bills of Sale Act the goods mentioned in that receipt had remained in the possession of the grantor, and, therefore, there had been no change of possession, and the document required to be registered under the Bills of Sale Act. The Court of Appeal in that case decided that the receipt did not come within the definition of an assurance under the Bills of Sale Act, and, therefore, was not a bill of sale within that Act, and did not require registration. However, upon the point as to change of possession, both Judges expressed a very strong opinion, the third Judge of the Court of Appeal declining to express any opinion upon that point because he thought it was immaterial for the decision of the Court, the receipt not being an assurance within the meaning of the Act. Mr. Purkiss has drawn our attention to the effect of the Married Woman's Property Act in cases of this kind. In the case of *Ramsay* v. *Margrett* the wife had possession of the articles, which had been sold to her by her husband, although they remained in the house wherein both lived. Whether, however, the articles were in her possession or apparent possession or not it was clear that the husband had made over the property to her, and the Court of Appeal held that they could not be seized for the husband's debts, and in my opinion the present case must be decided according to the principles laid down in that case. For these reasons I am of opinion that the appeal should be allowed.

PENNEFATHER, J. I concur.

Appeal Allowed.

Solicitors for appellant: *Moss & Barsden.*

Solicitors for respondent: *Haynes & Purkiss.*

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April 29.

The C. J. *Hensman*, J.

CROWDER, PLAINTIFF (APPELLANT).

HORGAN AND ANOTHER, DEFENDANTS (RESPONDENTS).

Solicitor — Negligence — Registration of mortgage — Negligent sale by mortgagee — Measure of damages—Judges discretion as to costs.

In May, 1896, the plaintiff agreed to guarantee an advance of £700, to be made by a bank to one F., upon receiving a second mortgage on a house in Perth belonging to F., and also a first mortgage of F's interest in an orchard and fruit garden, in which the plaintiff was also interested with others. The first mortgage on the house was for £700. The plaintiff instructed one of the defendants, who were solicitors in partnership, to prepare the mortgage deeds and register them. The orchard property was under the Transfer of Land Act, but the Perth property was not. The bank duly advanced the £700 to F., and the deeds were executed by F. in favor of the plaintiff; but owing to the defendant's negligence they were never registered. In September, 1896, F. sold his equity of redemption in the Perth property for £1,450, the purchaser paying the first mortgage debt, and F. receiving the balance, some £700, which he spent. The purchaser of the Perth property at once registered her title under the Act 19 Vic., No. 14, and the plaintiff's mortgage became void under that Statute. The plaintiff became aware of F's action early in 1897, and informed one of the defendants, who at once entered a caveat against the orchard property, which was thus protected. About this time F. called a meeting of his creditors, and offered them 2s. 6d. in the £. In August, 1899, the plaintiff sold F's interest in the orchard property by auction, without any notice to the defendants, or to the other persons who were interested in the property. The sale was advertised in one newspaper, where it appeared some 18 days before the sale, but the advertisement did not draw attention to the character of the property, and was calculated to cause persons reading it to conclude that the property advertised to be sold was unimproved land. The auctioneer who conducted the sale was unaccustomed to the sale of such properties, and F's interest realised only £50. The Judge at the trial found that the property in May, 1897, and at the time the guarantee was given, was worth £5,000, less a mortgage of £2,000, which was upon it; and he also found that F's interest in the orchard property at the time of the sale was worth £250, and that the sale was at grossly under value. The Judge held that the plaintiff was not bound to take action until he knew of the sale, and that after hearing of the sale he should be allowed some little time within which to call in the money and to give his notice under the Transfer of Land Act, and that, as the mortgage mentioned a term of three months, the plaintiff was not bound to sell until May, 1897. The Judge further held that the price which might have been obtained if the property had been sold properly was £250, less expenses, which he estimated at £20, and he gave a verdict for the plaintiff for the amount due to the bank in 1897, less £230. The question of costs being reserved for further argument, the Judge, on a subsequent motion, made no order as to costs, being of opinion that the case was within the principle of *Harnett* v. *Vyse* (*a*), the matter being in the Judge's discretion, and the litigation having been caused by the plaintiff's conduct. The plaintiff appealed as to the amount of damages awarded, and also as to the disallowance of costs.

Held, that the Judge properly estimated the amount of damages which the plaintiff was entitled to recover, and that there was no appeal on the question of costs, as there was no principle at stake, and that therefore the Judge's discretion ought not to be interfered with.

Parker, K.C., for appellant.

James, for respondent Horgan.

Moorhead, in person.

STONE, C.J. Although I may not be able to agree with all the reasons which influenced the learned Judge in arriving at the amount of damages which he estimated the plaintiff was entitled to

(*a*) 29 W.R. 7.

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recover, still, I think under all the circumstances no fault can be found with the amount. The action was an action against solicitors for negligence, and the negligence complained of was that the plaintiff was the holder of a mortgage over certain lands, which the solicitors, acting for the plaintiff, had neglected to register, and in consequence of this neglect the plaintiff alleged that he was damnified. The defendants, on the other hand, allege that they have also been damnified in respect of the sale—the negligent conduct of the sale—by the plaintiff, in respect of land which he held under another mortgage. Now, the learned Judge found that they were negligent, as alleged by the plaintiff, and I entirely agree with the finding on that point. The learned Judge assessed the loss which the defendants had sustained by reason of the negligent sale at £250, and he deducted that amount from an amount arrived at in respect of damage suffered by the plaintiff by reason of the non-registration of the mortgage. It appears that in consequence of this non-registration, the mortgagee, Fuchs, found himself in a position to deal with the property, subject to a prior mortgage. He sold the land, which realised £1,450, the purchaser paying the mortgage, and Fuchs receiving the balance of £700, which he put in his pocket. Now, the question arising is, what damage did the plaintiff sustain by reason of the neglect complained of? It seems clear to me that the damage was the loss of this security, which he was entitled to hold to indemnify him against any payment which he might be called upon to make with regard to a guarantee, which he had given to the bank, in reference to a loan by the bank to Fuchs. It has been contended that the only amount he was entitled to was the amount due to the bank at the time of the loss of this mortgage. It seems to me on this point that perhaps the learned Judge was rather liberal in his allowance, because he gave the plaintiff the amount due under his guarantee to the bank in the May following. I think it was May, 1896, when the plaintiff lost the value of his security, and the learned Judge calculated the amount of damage as the amount due to the bank in the May following, 1897. Therefore, I think he was rather liberal, and I am inclined to think that the plaintiff was only entitled to recover the value of the mortgage in October, 1896. Mr. Parker has addressed rather an ingenious argument to the Court with regard to when the cause of action accrued, contending that no cause accrued until the plaintiff had sustained damage, and that he had sustained no damage

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until he was called upon to pay, and did pay the bank upon his guarantee. I do not think we should look upon it in that light. The plaintiff held a valuable security, and he was entitled to hold that security until Fuchs had relieved him of his liability to the bank in respect of that guarantee, and as soon as the plaintiff lost that security he lost something which was tangible, namely, the value of that security, which he might have realised if called upon by the bank to pay off the guarantee. It is upon this basis that the damages in this case should be arrived at. With regard to the question of costs, I am clearly of opinion that there is no appeal in respect of the disallowance of costs by the learned Judge, because it seems to me that there was no principle at stake. A very wide discretion is left to the Judges with regard to costs, although, of course, that discretion is judicial, and must be exercised upon certain fixed principles. If there had been any principle at stake there might have been something in the appeal, but I do not think in this case my learned brother was wrong in his exercise of that discretion.

HENSMAN, J. I concur.

Appeal dismissed.

Solicitors for appellant: *Haynes & Purkiss.*

Respondent in person.

ROBERTS AND JAMES *v.* HUNTINGTON.

1901.

April 29.

The C. J. *Pennefather, J.*

Landlord and Tenant—Fixtures—Chattels—Tenant's right to remove after forfeiture—Registration notice—Transfer of Land Act—Surrender.

An agreement for lease for three years contained the following covenant, viz.:—"The lessor shall have the option, at the determination of this lease, of retaining the buildings erected on the demised premises on paying for same, the price to be fixed by valuation in the usual manner, but should the lessor elect not to take the buildings the lessee shall be entitled to remove them." The land leased was under the Transfer of Land Act, but the lease was not registered. The lessor's interest in the land was subsequently purchased by the plaintiffs, and they, therefore, became the registered proprietors of the land, and had actual notice of the unregistered lease. During the first year of the lease the lessee erected buildings on the land demised, and afterwards assigned his interest in the lease and buildings by Bill of Sale. The defendant subsequently purchased the mortgagee's interest under the Bill of Sale, and also the lessee's equity of redemption, and entered upon the land, and was in receipt of the rents. The defendant did not covenant to pay rent, and on demand refused to pay the same. The plaintiff, before the expiration of the lease by the effluxion of time, re-entered for non-payment of rent, and the lease became determined. Ejectment proceedings were then taken against the original lessee, but the defendant was not a party thereto, and thereafter the defendant, under his assignment and the covenant in the lease, claimed the right to remove the buildings.

Held, that the buildings erected on the land were in the nature of chattels, and the original tenant had power to assign, and his assignee under the covenant in the lease, had power to remove the buildings, the plaintiff not

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having exercised his right of purchase, and that the words in the covenant "determination of this lease" meant determination by effluxion of time or any sooner determination by forfeiture or otherwise.

Also held, that the refusal of the assignor to pay rent, he not having covenanted so to do, and the subsequent sub-letting by the plaintiffs of the land and buildings did not operate as a surrender in law, and that the lease being for three years, need not be registered; and, further, that the plaintiffs had actual notice thereof at the time they became registered proprietors of the land. That the ejectment proceedings against the original lessee did not operate as an estoppel as against the defendant, he not being a party thereto.

THIS was an action by the plaintiffs to restrain the defendant from removing certain buildings which had been erected on the plaintiffs' land by a former tenant under an agreement of lease, and from whom the defendant became the assignee. The defendant counter-claimed that he was entitled to remove the buildings or to receive their value under the agreement of lease, he being the assignee thereof.

At the trial, before Hensman, J., the following facts were proved or admitted :—

On the 8th November, 1897, one Lea (the then registered proprietor of the land), by agreement for lease, leased to one Allen, Kanowna Town Lot. No. 27 for three years from the 8th November, 1897.

The lease contained *inter alia* the following covenants :—

(*a*) Covenant to pay rent every fourth week, in default the lessor to be entitled to take possession of the premises, *and the agreement to cease and determine.*

(*b*) The lessor to have the option, *at the determination of the lease*, of retaining the buildings erected on the premises demised on paying for same, the price to be fixed by valuation in the usual manner, but should the lessor elect not to take the buildings *the lessee to be entitled to remove same.*

At the time of the demise no buildings were erected on the land, and it was mutually understood between lessor and lessee that the lessee would forthwith erect buildings on the land. The lessee entered into possession under the lease and erected buildings consisting of iron and wood at a cost of £400.

In January, 1898, Allen (the lessee) mortgaged (by Bill of Sale) to Long and Seebeck all his interest under the agreement for

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the lease and in the said buildings. Long and Seebeck did not covenant to pay rent, nor did they attorn to the lessors.

On 23rd April, 1898, the defendant purchased at a Sheriff's sale Allen's (lessee) equity of redemption (if any) in the agreement for lease.

On 30th May, 1898, the defendant purchased Long and Seebeck's interest under the Bill of Sale.

The defendant then entered into possession of the premises and receipt of the rents of the buildings, and practically stood in the original lessee's (Allen's) position, except that there was no covenant between the defendant and the lessor to pay rent, nor did the defendant attorn, or at any time pay any rent.

On 2nd September, 1899, the plaintiffs in this action became the registered proprietors (from Lea's mortgagee) of the said Town Lot.

The plaintiffs, when purchasing, had actual notice of the lease from Lea to Allen, and, although the same was not registered, the plaintiffs purchased subject to the lease.

On 9th October, 1899, plaintiffs gave the defendant notice to pay rent.

On 19th October, 1899, the defendant replied that he was not a tenant, and refused to pay rent.

On 26th October, 1899, the plaintiffs intimated that they would take ejectment proceedings, over four weeks' rent being then in arrear. The plaintiffs thereupon issued a writ of ejectment against the original lessee Allen. Allen entered an appearance, and a statement of claim was delivered, but Allen did not deliver a defence.

On 25th November, 1899, the plaintiffs obtained judgment, in default of defence, against Allen for *possession of land and buildings.*

On 1st December, 1899, the plaintiffs took possession of the land and buildings and proceeded to let the same.

On 26th January, 1900, the defendant wrote requiring the plaintiffs to elect under covenant (*b*) of lease, and alternatively demanded the buildings in accordance with the agreement for lease of 8th November, 1897, he being the assignee thereof, and he also gave notice that he would enter upon the land and remove the buildings.

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The plaintiffs thereupon commenced this action, and the defendant counter-claimed as above stated. At the trial the Judge dismissed the plaintiffs' claim and gave judgment for the defendant on the counter-claim with costs.

On Appeal.

Villeneuve Smith (with him *F. S. Harney*), for appellants. As soon as the buildings were erected on the land they were in the nature of fixtures, that is, they could not be removed or severed from the land, at any rate until the term granted (three years) had expired—they were, in fact, the property of the lessor, and part of the freehold, until the determination of the term. If at that period the lessor elected to purchase, the buildings remained fixtures; if, on the other hand, he did not elect, the buildings would then become chattels, and the lessee's right to remove would then, and not till then, arise, and that being so he (lessee) had no power during the term (*i.e.*, three months after the lease was granted) to assign to Long and Seebeck. That assignment was bad, and as defendant's title arose thereon he was in the same position as Long and Seebeck. *Lee* v. *Risdon* (*a*), *ex parte* Lloyd (*b*), *McIntosh* v. *Trotter* (*c*), *Raffey* v. *Henderson* (*d*), *Wild* v. *Waters* (*e*), *Minshall* v. *Lloyd* (*f*) *Nicholls* v. *Abbott* (*g*). The words "determination of the term" in paragraph (*b*) of lease are clear and unmistakable, and shew the clear intention of the parties—namely, that at the expiration of the lease by effluxion of time only would the right of the tenant to remove arise, and then only on the lessee declining to exercise his right. Had the intention of the parties been otherwise the words "at expiration or sooner determination" would have been used, and it is clear these words were omitted, so that, in the event of forfeiture during the term, the buildings would be an asset to protect the lessor against loss. *Pugh* v. *Atton* (*h*). The lease is in the nature of a building lease, and in effect the lessor in granting it says to the lessee—"If you pay your rent, etc., regularly for three years, I will, at the expiration thereof, purchase your improvements, and if I do not you may remove them," and this construction is borne out by paragraph (*a*), wherein it is provided in case of forfeiture *this agreement shall cease and determine.* Forfeiture did take place on

(*a*) 7 Taunt., 188.
(*b*) 1 Mont. & Ayr., 508.
(*c*) 3 M. and W., 134.
(*d*) 17 Q.B., 574.
(*e*) 16 C.B., 637.
(*f*) 2 M. and W., 450.
(*g*) 10 S.B., 944.
(*h*) L.R., 8 Eq., 626.

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December 1, 1899. The agreement, therefore, had ceased to exist, and was determined. The defendant cannot set up an agreement in 1900 that had ceased to exist in 1899. The defendant's refusal to pay rent, and the plaintiffs' subsequent lease of the land, etc., constitute a surrender by operation of law. *Weston* v. *Woodcock* (*a*). The defendant is estopped, as the judgment of this Court, in ejectment against Allen, passed the land and buildings to plaintiffs. The defendant had notice of this action, and could have come in to protect his interests "qua" the buildings. *Pickard* v. *Sears* (*b*), *Freeman* v. *Cooke* (*c*) *Smiths Leading Cases* (*d*), *Phene* v. *Popplewell* (*e*).

W. H. James, for respondents. Under the agreement for lease the buildings erected by the lessee now became fixtures. They were chattels only. The property as well as possession in them remained in the lessee until the end or sooner determination of the lease, when a right then arose in the lessor—namely to purchase. That being the case the lessee had power during the term to dispose of or mortgage the chattels. As to the words "determination of lease," they are the usual words used in leases, and mean, and are intended to mean, any determination of the lease, whether by effluxion of time, by surrender, or by forfeiture during the term, and, therefore, on the forfeiture arising in December, 1899, the right of the plaintiffs arose to purchase in terms of the lease, and, they having failed to do so, the defendant was entitled to enter upon the land within a reasonable time after such determination and remove the buildings erected during the term. As to the defendant having surrendered the lease, he not having covenanted to pay rent and not having attorned, his mere refusal could not be deemed a surrender. As to estoppel, the defendant was not a party to the ejectment proceedings, and, therefore, cannot be bound by the judgment against Allen, a judgment moreover obtained by default, and even had he had notice of such proceedings he was not bound to interfere.

STONE J. I am of opinion that no exception can be taken to the judgment of the learned Judge in the Court below, and that this appeal should be dismissed. Several points have been urged before us. It seems to me that the judgment must stand or fall

(*a*) 7 M. and W., 14.
(*b*) 6 Ad. and E., 469.
(*c*) 2 Ex. Rep., 654.
(*d*) N.P., 825.
(*e*) 31 L.J., C.P., 235.

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upon our decision upon one of those points, and that is, the construction that we should place upon the first agreement, the agreement of lease for three years. I quite agree with the view the learned Judge in the Court below took of the meaning of this agreement, namely, that the parties intended all through to treat these buildings as chattels, and not as fixtures, and so passing with the land. When articles are affixed to the land they become, with certain exceptions, part of the freehold, and, therefore, there is no occasion for the landlord, as the articles so affixed to the freehold belong to him, to make any provision in the agreement or lease with regard to his right therein, but if it is intended that these articles, whether they be affixed to the freehold or not, shall be treated simply as chattels and not pass to the landlord, then it is necessary, if the landlord is desirous at the end or sooner determination of the term, to clear the property of these articles, to make provision that he shall be entitled to do so under the circumstances. In this case the agreement makes such a provision. There is no agreement on the part of the lessee to erect any buildings, but it appears that it was in contemplation by him; and that it was indeed in contemplation between the parties—the landlord and the tenant—that certain buildings should be erected by the tenant, but whether those buildings were to form part of the consideration for the letting by the landlord to the tenant is another question, because it was open to doubt whether it was part of the consideration, taking into account the very high rent that the tenant was paying for this small piece of land. But the landlord did make the provision that I have alluded to, that is, he provided that at the determination of the lease he should have the power or the option of taking these buildings upon paying to the tenant a price to be fixed by valuation, and in the event of his not exercising that option the tenant should be entitled to remove them. I do not know that it was necessary to have put in that second provision in favor of the tenant, because it was clear that it was contemplated by the parties up to the time of the exercise of that option by the landlord that the articles were chattels, and the property of the tenant, and, thorefore, if the landlord failed to exercise the right of option granted to him by the terms of the agreement, the tenant was clearly entitled to remove his own property. Starting, then, with that opinion—that these buildings were chattels, and were not fixtures, and did not pass to the landlord, but were the property

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of the tenant, and finding that the landlord did not exercise his option, the buildings still belong to the tenant, and he had clearly an assignable interest in them. The defendant was the owner of the equity of redemption of the tenant's right in these buildings, and he subsequently purchased all the right under a sale by the Sheriff. The mortgage on the property then became merged in the equity of redemption, and the whole of the title in these buildings passed to the defendant. It is urged that the agreement came to an end when the tenant made default in payment of rent, and the landlord re-entered and took possession, and that the agreement being at an end, the right of the lessee to take possession under Clause 4 was lost. Now, I cannot agree with that contention at all. It was evident from the reading of the agreement that it was never intended that Clause 3 should operate in that way. Clause 4 goes on expressly to give the lessee power at the determination of the lease or agreement to remove the property, but even if that power had not been given, and if the agreement was at an end, he would have had the right to remove that which belonged to him, because the property certainly, although the agreement may have come to an end, did not pass to the landlord; it remained in the tenant subject to the landlord's right to purchase at a price. With regard to the other point, that the defendant is estopped from setting up his title to this property by his conduct in acknowledging that he was liable to pay the rent, and allowing the ejectment to be obtained against Allen, I do not think that should be used in support of the doctrine of estoppel. I agree with my brother Hensman in the view that he expressed as to the effect of that letter that was written by or on behalf of the defendant, viz., that it was simply a statement denying his liability for the rent, and in regard to the action against Allen, that action was taken against Allen behind the defendant's back, and I do not see how in any way the judgment obtained in that action could be used as a bar to the plaintiff's case in respect of all chattels belonging to him upon the land. As Mr. James pointed out, the action against Allen was an action of ejectment in respect of the land. If the house had been affixed to the freehold it would, of course, have passed with the freehold to the plaintiff, and a judgment of ejectment against Allen would have given the possession of the land and whatever was upon the land. As, in my opinion, the houses were not affixed to the freehold, but were chattels, and belonged to the

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defendant (the respondent), I cannot see how the action of ejectment in that case affects his right to the property. The question in regard to the operation of the Land Act does not seem to me to have any bearing upon the question in view of the opinion I have expressed with regard to the effect of this first agreement.

PENNEFATHER, J. The agreement in this case of November, 1897, between Lea, the owner of the fee simple of the land, and Allen, is to my mind the crux of the whole situation. What is the true construction to put upon that agreement? On the face of that agreement there is no obligation whatever imposed upon Allen, the tenant, to put up buildings. It may have been in the contemplation of the parties, but that could not be legally enforced. Then we have this additional circumstance, which lends, I think, undoubted weight to the contention that these buildings were not to be regarded as fixtures, but as chattels. There is in that agreement a clause which says, in so many words, that before the tenant can remove the buildings he must give his landlord the right to buy them. This, as everyone knows, is just the reverse of the usual clauses which are inserted in such a lease between landlord and tenant. The usual lease provides for the tenant taking away fixtures at his option before the expiration of the term, but here is the very reverse of that, the tenant himself puts up the buildings, and gives to the landlord under that agreement the right to purchase them before the tenant or his assigns can take them away. That, to my mind, fairly shewed that these buildings remained from the time they were put up the property of the tenant Allen or his representatives. Therefore it is not a case of fixtures at all. The parties deliberately agree that there shall be no doubt about the fixtures, which are to be the property of the tenant Allen, and, therefore, to be regarded as chattels. The test of that is—supposing a fire had taken place and the buildings were destroyed, who would be the loser?—Not the landlord, but the tenant. It would be the tenant's loss. If it was the tenant's property while he was in possession under this lease, clearly it remained his property at the determination of the lease or agreement. It must be borne in mind that the object of the ejectment was not to get the buildings, but to get possession of the land. The building is to be regarded as a chattel, and the purchaser, no matter what takes place subsequently, cannot alter the nature of the article. It is a chattel, and although the action of ejectment was brought, it does not

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necessarily confer any title upon the landlord in respect of that chattel. It was clearly expressed in that agreement that these buildings were to be regarded as chattels, and, therefore, they were the property of the tenant or his representatives.

Appeal dismissed.

Solicitors for appellants: *Harney & Harney.*

Solicitors for respondent: *George Leake & Co.*

O'HALLORAN, PLAINTIFF (RESPONDENT).

GREAT BOULDER PROPRIETARY G.M., LTD., DEFENDANTS (APPELLANTS).

1901.
May 2.

The C. J.
Hensman, J.
Pennefather, J.

Negligence—Mines Regulation Act, 1895, *Sec.* 27—*Contributory Negligence—Common Law—Findings of Jury*—59 *Vic.*, *No.* 37, *Sec.* 20, *Sec.* 23, *Sub. Sec.* 20, *Sec.* 27.

In an action for damages for injuries received by the plaintiff whilst working on the defendant Company's mine, damages were claimed for the negligence of the defendants in not keeping proper and sufficient lights. The questions put to the jury, and their answers thereto at the trial were as follows:—

1. Were the defendants negligent in not keeping proper and sufficient lights? Answer: The defendants provided sufficient lights, but there was some slight neglect in not keeping them in proper order.
2. Was the plaintiff willing, or did he agree to accept the risk and work without such lights? Answer: No.
3. Were the plaintiff's injuries caused by the absence of such lights? Answer: Yes.
4. Did the plaintiff contribute to the accident by his own negligence? Answer: Yes.
5. Damages? Answer: £200.

Judgment was entered on these findings for the plaintiff.

On Appeal.

Held, that the plaintiff was entitled to judgment on the findings of the jury, the Court being of opinion that Sec. 27 was meant to alter the Common Law doctrine of contributory negligence, and that the section is to be applied only in regard to reduction of damages or costs.

Moorhead, K.C. (with him *Phillips*), for the appellants. There are two causes of action, one under the Common Law, and the other under the Employers' Liability Act, but not a third under the Mines Regulation Act. The first finding does not support the action at Common Law. There is no duty on the master to keep machinery in proper order; having provided the machinery his obligation is discharged. Finding No. 4 cuts away the defence under the Employers' Liability Act. *Weblin* v. *Bellard* (*a*), the *Sans Pareil* (*b*). The plaintiff was himself guilty of a breach of the section, and therefore there is no right of action, it being obligatory

(*a*) 17 Q.B. 182. (*b*) 1900 2 P.D. 268.

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on a person in his position to communicate to his employer the fact that he was in danger. *Baddeley* v. *Granville* (*a*), *Caswell* v. *Worth* (*b*).

Haynes (with him *Abbott*), for the respondent. In *Baddeley* v. *Granville* it was held that the breach of a statutory duty could not be contributory negligence. *Thomas* v. *Quartermain* (*c*). I admit that, under the Common Law, I could not obtain a verdict on the answers given by the jury, but under the Mines Regulation Act the accident must be "solely due" to the negligence of the plaintiff before negligence is a complete answer to his action. The jury having found, by their answers to questions 1 and 2, that the proximate cause of the accident was neglect on the part of the defendants, the finding giving damages cannot alone be set aside.

Moorhead, K.C., in reply. The effect of Section 27 is to alter the Common Law. It enacts that an action will lie for injury except in one instance. The plaintiff's action was one for negligence as distinguished from a breach of the regulations. There are two sets of circumstances under which a party has a right to recover—(1), owing to the negligence of the owner of the mine or his agent; and (2), owing to the non-observance of any of the provisions of the Act, such non-observance not being "solely due" to the negligence of the plaintiff. The provisions of the Act are practically a repetition of the Common Law, *i.e.*, simply a codification of the existing Common Law. An instance cannot be given shewing that a man has an action under the Common Law which he cannot bring under this Act. If, then, these provisions are merely a repetition of the Common Law liability, exactly the same defences are open. There are two questions, viz.—(1), under Section 27 is the defence of contributory negligence taken away? and (2), if there has been a breach of Statutory duty on the part of the plaintiff is he disentitled to recover? With regard to (1), before a defence at Common Law can be taken away the language of the Act so taking it away must be clear and unmistakable. With regard to (2) I have not contended that there was such a breach of duty. The Act only declares the Common Law.

Cur adv. vult.

STONE, C.J. This was an appeal to set aside the judgment for the plaintiff entered up on the findings of the jury, and to enter

(*a*) 19 Q.B.D. 423. (*b*) 5 E. & B. 849. (*c*) 18 Q.B.D. 685.

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judgment for the defendants. The action was one for negligence, with an alternative claim under the Employers' Liability Act. There was no claim for any breach of a Statutory duty, and it is important to bear this in mind, because, in the course of my remarks, I shall have to refer to the distinction between an action for negligence and an action for breach of a Statutory duty. It appears that the plaintiff was employed on the defendant company's mine, and during such employment was injured, owing, as it is alleged in the statement of claim, to the negligence of the defendant company in lighting the place where the plaintiff was working, or to provide lights there of a proper quality and description whereby he could conduct his work and avoid any danger. Under the claim, under the Employers' Liability Act, it was alleged that there was a defect in the ways, works, and plant connected and used with a certain slimes heap in which the plaintiff was working, inasmuch as the electric lamp would not keep alight, and in consequence of the darkness the plaintiff was injured. I propose first of all to refer to the summing up of the learned Judge in the Court below, but not for the purpose of directing attention to any objection that I may have to the direction of the learned Judge, because during the course of the argument before us no such objection was raised. I refer to my learned brother's summing up for the purpose of drawing attention to the form in which the claim of the plaintiff was presented to the jury, disclosing, in my opinion, the fact that the learned Judge was of opinion that the action was one for negligence, and not for breach of a Statutory duty. The learned Judge said this was an action in which the plaintiff claimed damages against the defendant Company by reason, as he alleges, of the defendants' negligence, which, he says, was the cause of this serious injury to him, and the particular negligence which the plaintiff puts forward is, that the Company did not provide proper and sufficient light for the purpose for which he was at work, namely, cutting down the face of this dump or mass of used up material. The learned Judge said, "that, therefore, will be one of the questions you will have to decide, amongst others, to which I shall refer in due course. The question will be, whether there is evidence from which you can find that the defendants neglected their duty in this respect. . . . . It is not necessary for you to consider, on the present occasion, whether the duties of the defendant company were by reason of the Common Law liability or by reason of the

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Statute, because it comes to much the same thing." The only observation I have to make with regard to that direction is, that it appears to me that there is, or may be, a distinction between an action at Common Law for negligence and an action upon the Statute for negligence, because it is admitted that at Common Law the defence of contributory negligence, if proved, is an answer to the action. It is, however, contended, and my learned brothers are of that opinion, that under the Statute you cannot set up the defence of contributory negligence as a complete answer to an action under the Statute, so apparently there is that distinction between an action at Common Law and an action under the Statute. The learned Judge, in dealing with the second question, said, "the next question is—Was the plaintiff willing, or did he agree to accept the risk of working without such lights." That raises the question of *volenti non fit injuria*, which is a defence which cannot be raised for a breach of a Statutory duty. It has been held that it is no defence to an action for a breach of a Statutory duty to say that the plaintiff was willing and agreed to accept the risk which brought about the accident. And, therefore, I take it that the learned Judge, in putting that question to the jury, was dealing with an action for negligence under the Statute or under the Employers' Liability Act, and could not have had in his mind an action for a breach of a Statutory duty. The third question was whether the plaintiff's injuries were caused by the absence of such light, and the fourth question was whether the plaintiff contributed to the accident by his own neglect. Then, it appears, the Judge directed the jury that he thought they would come to the conclusion that there had been some negligence on the part of the plaintiff, because, when he discovered that something was wrong, it was his duty to let his employers know of the defect, which he did not. There again I presume the learned Judge was dealing with the action as an action at Common Law, or under the Employers' Liability Act, and not with an action under the Statute, because I gather that my learned brother is of opinion that contributory negligence would not be set up as a defence to an action under the Statute, and, that being his opinion, I presume he would not have put this question to the jury if they were considering an action under the Statute. Therefore, I take it, that that question had reference to an action outside the Statute. The fifth question had reference to damages. After the jury had retired they were recalled, the learned

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Judge saying that he had omitted to point out that they had five questions before them, and he wished to draw their attention to the fourth question, dealing with contributory negligence. The learned Judge used these words—"Should you find that the plaintiff contributed to the accident by his own negligence, you must take that into consideration when you consider the amount of damages you give, and I have recalled you to inform you that the law allows you to take contributory negligence into consideration in cases of this kind." Now, but for that direction, I think I should have come to the conclusion that the judgment entered upon the findings of the jury was wrong. I have very grave doubt myself upon the question as to whether, by the 27th Section of the Mines Regulation Act, the doctrine of contributory negligence is abolished; indeed, I have always had some doubt on that point. I am aware that Chief Justice Onslow and Mr. Justice Hensman have held a different opinion, and have directed juries to the effect that contributory negligence was no defence to an action under our Mining Act. I have always had some doubt, and I do not remember any case which has been brought before me under the Mines Regulation Act where contributory negligence has been set up as a defence, and where contributory negligence, as in this case, has been found by the jury. This, as far as I can remember, is the first occasion upon which such a case has been drawn to my attention. I have never, during the course of the cases that I have heard, had my attention directed to the question now before us. I am not aware whether my learned brothers have had it argued before them, but I am under the impression that it has never been argued before me. The jury in this case answered the questions put them by the learned Judge as follows:—1. Were the defendants negligent in not keeping proper and sufficient light?—The defendants provided sufficient lights, but there was some slight neglect in not keeping them in proper order. 2. Was the plaintiff willing, or did he agree to accept the risk and work without such lights?—No. 3. Were the plaintiff's injuries caused by the absence of such light?—Yes. 4. Did the plaintiff contribute to the accident by his own negligence?—Yes. 5. If the plaintiff is entitled to a verdict, what damages should he recover?—£200. Now, I think we can dismiss from our minds the points that were taken with regard to the effect of these findings upon a claim under the Employers' Liability Act, because I do not think Mr. Haynes

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objected to the contention of Mr. Moorhead with regard to the bearing of these findings upon that part of the claim. It was contended by Mr. Moorhead that upon these findings a verdict should be entered for the defendants, whether the action was brought at Common Law or under the Mines Regulation Act, and Mr. Moorhead argued at some length as to the meaning of the provisions of the 27th Section of the Act. That Section provides that if any person in or about a mine suffers injury in person, or is killed owing to the non-observance in such mine of any of the provisions of the Act (such non-observance not being solely due to the negligence of the person so injured or killed), the person injured may recover damages as for a tort committed by such owner. I agree with the learned counsel that this Section is really divided into two parts, one providing for the case of a person who is injured or killed owing to negligence, and the other providing for a case of a person injured owing to the non-observance in such mine of any of the provisions of the Act. It seems to me that this Section is only declaratory of the Common Law. It goes no further than the Common Law. We know that if any person about a mine is killed or injured owing to the negligence of another, he is entitled to damages. We do not want a Statute to inform us of that, nor do we want a Statute to tell us that if a man is injured, owing to the breach of a Statutory duty, he will be entitled to damages. The Section does, however, go a little beyond the Common Law, in providing that in estimating the damages, due regard shall be had to the extent (if any) to which the person injured contributed to the injury. In an action at Common Law, under the Employers' Liability Act, or under any other Statute, unless the power is distinctly taken away, it is in the power of the jury to take into consideration the question of negligence on the part of the plaintiff. In the case of *Raynor* v. *Mitchell* (*a*), which was an action for an injury to a sloop belonging to the plaintiff, the amount of damage proved was £500, but the jury gave only £250, and on being asked how they estimated the amount, replied that, in their opinion, there were faults on both sides. In that case there was no defence of contributory negligence, but it was argued that as there were faults on both sides, the defendant was entitled to a verdict. It was held, however, that notwithstanding this the plaintiff was entitled to the verdict, as there might have been a fault on his side up to a certain

(*a*) 2 C.P.D. 357.

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extent, and yet not to such an extent as to prevent him recovering. So with regard to this proviso in Section 27, I do not think the Legislature intended to deprive a defendant of the defence of contributory negligence open to him at Common Law, but simply not to leave it optional for the jury, in estimating the damages, to take into consideration whether there were faults on both sides, but to make it compulsory on their part to take into consideration "the extent (if any) to which the person injured contributed by any negligence on his own part to the injury." If this be so it is a very different provision to the legal doctrine of contributory negligence. Then again I do not think we should be in a hurry to come to the conclusion that the Legislature intended by this proviso to take away that defence. In *Hardcastle on the Construction of Statutes*, page 321, in referring to the effect of a Statute, which takes away rights previously existing, it is stated, "If it is clear that it was the intention of the Legislature, in passing a new Statute, to abrogate the previous Common Law on the subject, the Common Law must give way, and the Statute must prevail; but if, as Coleridge, J., said, in *Regina* v. *Scott* (*a*), there is "a seeming conflict between the Common Law and the provisions of a Statute," it is not right to begin "by assuming at once that there is a real conflict and sacrificing the Common Law," we ought rather to proceed in the first place "by carefully examining whether the two may not be reconciled, and full effect given to both." I have already drawn attention to the distinction that this Section has made, and which I am of opinion was intended by the Legislature to be made without abolishing the defence of contributory negligence. This proviso may exist with the defence of contributory negligence, because the jury would, under the proviso, be entitled, if they did not think the evidence proved the plaintiff guilty of contributory negligence, to take into consideration whether there had been some fault on his side also, which would lead them to reduce the damages they might otherwise have given. I do not think it would be inconsistent at all for the jury to have that power, and contributory negligence to still be a defence. I certainly have very considerable doubt whether the 27th Section does sufficiently declare and disclose an intention on the part of the Legislature to take away that Common Law defence. Great stress has been laid upon the effect of Section 20, under which the burden of proof is removed from the plaintiff to

(*a*) 25 L.J., M.C. 133.

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the defendant, but even at Common Law there are some cases where the onus is shifted—such cases as a railway collision between two trains belonging to the same company, and the case of the bag of flour falling from a warehouse and injuring a man—but even in those cases it is open to the defendant to set up the defence of contributory negligence, and, therefore, I am unable to see how the section in our Act, which changes the burden of proof, can be called in aid in favour of the contention that it was the intention of the Legislature to take away that Common Law right that all defendants have hitherto had. These views that I have expressed disclose the opinion that I entertain with regard to the question that has been raised, but as I still have a doubt as to whether I am right in the opinion I hold, and my learned brothers have no doubt that I am wrong, I will not go so far as to say that I disagree with them. I have, however, thought it right, having this doubt, to express my views accordingly.

HENSMAN J. In this case it is desirable to state what the issues were which had to be submitted to the jury. The plaintiff was working on the defendant Company's mine, and he alleged that the defendants were negligent in not properly lighting a heap of slime upon which he was engaged. It was not contended that the work was dangerous if proper lights were provided, but that light was essential. The plaintiff alleged that the lamps went out, and in consequence he was unable to see a crack which he would otherwise have seen, the result being a fall of earth which injured him. The defence was first, a denial of the facts alleged by the plaintiff; secondly, that the plaintiff agreed to accept the risk; and thirdly, that he contributed to his own injuries. The findings of the jury were, that the defendants were negligent in not keeping their lights going in proper order; that the injuries were caused by the absence of light; that the plaintiff did not agree or was not willing to accept the risk; but that he did contribute to the accident. The questions put to the jury were approved of by the Counsel at the trial, and neither of them made any suggestion that any further questions should be put. The learned Chief Justice has commented upon my summing up, and has suggested that certain ideas were in my mind at the time. I am not prepared now to recall what was in my mind, or whether I had one or another cause of action in my mind at the time. It was necessary, however, at the trial, that I should put to

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the jury the issues raised on the pleadings, and if, in the course of my summing up, there is found to be an absence of reference to various points to which His Honor has referred, it is because I desire, when addressing a jury, not to confuse their minds by drawing distinctions between actions brought at Common Law and under different Statutes. Indeed, I think that juries do not appreciate these distinctions. The jury found that the plaintiff's injuries were caused by the negligence of the defendants. It was argued before us that the plaintiff had contravened Section 26 of the Act, which says that a workman is not to work in an unsafe place, and that the plaintiff could not, therefore, recover in an action. With regard to that I will say first that no such exact issue was before the jury, and no finding was given on that point. Although not called upon now to give a judicial decision upon that point, I am inclined to the opinion that Section 26 does not apply to such a state of things as arose here. Even if the case was within the section both parties were at fault, because the jury found that the defendants had violated the Act in respect of lights, and I am of opinion that it would not lie in the mouth of the defendants to set up such a defence. Further, there is a great difference between a man becoming liable to a small fine and being deprived of a cause of action, and I do not think that the section intended to take away the right of action. The jury also found that the plaintiff never agreed to accept any risk; he may have known of it, but he never agreed to accept it, and there was evidence that the men felt that unless they went on working they would, to use their own words, "get the sack." At most the defendant was guilty of contributory negligence, and as to that I propose to say a few words. One principal object of this Act is to throw the duty of taking the greatest possible care of the miners upon owners of mines; to protect the miners themselves against their own recklessness and carelessness. The Legislature must have known that with all men the constant presence of danger is apt to make them careless, and it was determined to shield the men as far as possible from their own negligence. I look upon Section 20, which makes the occurrence of an accident on a mine *primâ facie* evidence of negligence in the owner, not as bearing directly on the question of contributory negligence, but as showing the care the Legislature intended to take of the men. Coming to Section 27, the words appear to me to very clearly shew an intention to alter the doctrine

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of contributory negligence. They take it away as a defence to the action, but provide that the jury, in assessing the damages, shall have due regard to the extent to which the person injured has contributed to the accident. The section says "due regard shall be had to the extent (if any) to which the person injured contributed." However great the negligence of the plaintiff may be, it is still only to be taken into consideration in dealing with the question of damages, although at Common Law such negligence would be a complete defence. I think the Legislature considered that there would probably be many cases in which the plaintiff would contribute to some extent to his own injuries, and, in making this Act, they wished to shew that he was not to be deprived of his remedy altogether, but that the jury were to take his negligence into consideration. I am bound to say that the words of the Statute appear to me to be so clear that I can entertain no doubt that the Legislature intended to do away with the doctrine of contributory negligence as an absolute defence to an action. There is one other observation I wish to make. This Act has been in force for four or five years, and although this may be the first time that the jury have found contributory negligence, yet Judges have again and again addressed juries and pointed out to them that they must only consider contributory negligence in regard to the amount of damages, and if found, they must reduce the damages accordingly. I think that if this direction had been wrong, or even if there had been any doubt about it, it would have been found that Counsel would have directed the Judge's attention to it, and would have asked him for a ruling upon that point. Statutes after all are meant to be read by the public, and not only by lawyers. It is a sound rule of construction that the plain ordinary meaning of words must be taken to be their true meaning, unless there is something which shews that the words are not used in their ordinary sense. Here the plain meaning of the words of the section appears to be that which has been accepted for years without question by Judges, and by the legal profession. I am of opinion that this appeal ought to be dismissed.

PENNEFATHER, J. The plaintiff, a miner, brought an action for negligence against the defendant company. The act of negligence relied upon was in not providing proper and sufficient light. The jury found in favour of the plaintiff, but they also found he was guilty of contributory negligence. The damages were assessed

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at £200, and judgment was entered for the plaintiff. This is an appeal from that judgment. At Common Law contributory negligence is an answer to an action for negligence, and it is, therefore, quite clear the plaintiff would not be entitled to this judgment but for the introduction of some Statutory enactment. This Statutory provision is, I am of opinion, contained in Section 27 of the Mines Regulation Act, 1895. Sec. 27, as amended by 63 Vic., No. 49, says—"If any person employed in or about a mine suffers injury in person or is killed owing to the negligence of the owner of such mine or his agent or agents or owing to the non-observance in such mine of any of the provisions of this Act (such non-observance not being solely due to the negligence of the person so injured or killed) the person injured or his personal representatives or the personal representatives of the person so killed may recover in any Court of competent jurisdiction from the owner of such mine compensation by way of damages as for a tort committed by such owner. Provided that in estimating the damages and deciding the question of costs due regard shall be had to the extent (if any) to which the person injured or killed contributed by any negligence on his own part to the injury or death." The plaintiff worked at night by electric light, and, through some defect in the electric apparatus, the light went out. While working in the dark the plaintiff was injured. These facts brought the plaintiff's case within the operation of Sec. 23, sub-Sec. 20 of the Act, which provides that all machinery shall be kept in good order and condition. On the finding of the jury, therefore, the defendant company was found guilty of this non-observance of one of the provisions of the Act. Was that non-observance, to use the words of the Act, "solely due to the negligence" of the plaintiff? Clearly not. The defendant company supplied the light, and controlled and regulated the machinery by which it was generated. The plaintiff had no duty imposed upon him in regard to it. The plaintiff is, therefore, entitled to recover damages under this section against the defendant company. But it is contended on the part of the defendant company that this Statute does not take away the defence of contributory negligence always available at Common Law to a defendant. I am of opinion it does. What possible meaning can the words in the parenthesis of this section have if not inserted for this purpose? And why should the proviso to the section be inserted, by which it is expressly provided that in

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estimating the damages and deciding the question of costs the contributory negligence of the plaintiff is to be considered? If the contributory negligence is an answer to the action, why take it into account in considering tne damages? I am of opinion contributory negligence is, therefore, no defence under the Act, and can only be urged in reduction of damages and costs. The object of Section 27 is to protect the miner from the combined effect of his own negligence and that of the mine owner. The general scope of the Act is to safeguard the miner in his perilous occupation. This intention is carried into effect by imposing Statutory duties, more onerous than those which prevail at Common Law, upon the mine owner, and by facilitating the procedure in actions for negligence. The burden of proof in any action of negligence is now on the defendant. The plaintiff launches his case by proving the occurrence of an accident, and that he was injured. The defendant is liable unless he can prove either a *vis major*, or that the accident was solely caused by the plaintiff's non-observance of the Statutory regulations. I am, therefore, of opinion that the judgment was properly entered for the plaintiff, and this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Martin & Phillips.*

Solicitor for respondent: *A. F. Abbott.*

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RAYNOR, PLAINTIFF (APPELLANT).

JENKINS & ANOTHER, DEFENDANTS (RESPONDENTS).

1901.

May 3.

The C. J.
Hensman, J.
Pennefather, J.

Judgment debtors summons—Debtors Act, 1871—34 *Vic.*, *No.* 21, *Sec.* 3—*Receiving Order—Restraining Order under Bankruptcy Act*, 1892—55 *Vic.*, *No.* 32, *Sec.* 9—*False Imprisonment—Trespass—Malicious Prosecution.*

The Defendants, solicitors, on behalf of a client, applied for and obtained a judgment summons against the plaintiff, and on the hearing thereof in the Local Court an order was made against the plaintiff for the payment of the judgment debt, within seven days, in default 40 days' imprisonment. The plaintiff made default, but nothing was done for some time after the seven days had expired, as proceedings were stayed pending appeals in the action and on an inter-pleader issue. These appeals having been disposed of adversely to the plaintiff, he filed a petition in bankruptcy against himself, and a receiving order was made thereon. Twelve days after the receiving order was made the defendants, through their managing clerk, and with full notice of the receiving order, obtained a warrant of commitment from the clerk of the Local Court, under the order for the payment of the judgment debt, and caused the plaintiff to be arrested and imprisoned. He was subsequently discharged by the Magistrate. The plaintiff brought an action for trespass and false imprisonment before a Judge and jury. The Judge non-suited the plaintiff, holding that neither trespass nor false imprisonment lay on the ground that the arrest was the act of the Magistrate, that the order and warrant were good, and that it was incumbent on the plaintiff to shew either that the order upon which the warrant was obtained was bad for an irregularity, or that the money, in respect of which the order was obtained, had been paid, and that the plaintiff's action (if any) was for malicious prosecution.

On Appeal.

Held (HENSMAN, J., dissenting), that on the claim for trespass no cause of action was disclosed, as the issuing of the order was a judicial act, and, therefore, trespass would not lie. The action (if any) on that issue would be malicious prosecution.

Per HENSMAN, J., that on the claim for false imprisonment there was a case to go to the jury, there being evidence that the defendants did obtain the warrant and cause the arrest, in defiance of Section 9 of the Bankruptcy Act, 1892, and that at the time they had notice of the receiving order. That Section 9 of the Bankruptcy Act, 1892, was an absolute protection to the debtor from arrest. That the bankrupt having failed to obtain a restraining order under Section 10 of the same Act was no answer by the defendant, as the words of the latter section do not qualify or abrogate the words of Section 9, and that, therefore, as to the claim for false imprisonment the learned Judge was wrong in entering judgment for the defendant.

Villeneuve Smith, for Appellant. The defendants having, by their clerk, applied for and obtained the warrant of commitment, and caused the arrest of plaintiff 12 days after the receiving order was made, the plaintiff's person

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being protected by virtue of Section 9 of Bankruptcy Act, were liable in trespass or false imprisonment, or both; they (the defendants) having acted in defiance of the Statute—*Brooks* v. *Hodkinson* (*a*). The issuing of the warrant was purely a ministerial act on the part of the Clerk of the Court. The Magistrate had nothing to do with that; all he did was to make an order, which only took effect when the defendants had satisfied the Clerk of Court that default had been made, and the clerk thereupon issued the warrant at defendant's instigation. As in the former practice of holding to bail, the Judge made the order, but the person obtaining same set the Sheriff in motion, and would be liable in trespass and false imprisonment if such warrant were improperly issued. That being the case, Section 9 of the Bankruptcy Act was an absolute protection to plaintiff from the moment the Receiving Order was made, and Section 10 did not qualify Section 9. It simply gave power to the Court to stay proceedings against a bankrupt from the moment the Petition in Bankruptcy was filed. It frequently happens that a Receiving Order is not made for some days or even weeks, after the Petition is presented, therefore Section 10 was the means by which the bankrupt and his estate were protected after the Petition, and pending the making of the Receiving Order. The cases cited by the defendants in the Court below did not apply to persons who were being proceeded against under Section 5 of the Imperial Debtors Act, 1869—(Section 3 of the Western Australian Debtors Act). These cases refer to questions arising under Section 4 of the Imperial Act, Sub-sections 3 and 4, which have not been adopted in the Local Act, and which relate solely to defaulting trustees and solicitors; under these Sub-sections the imprisonment is in the nature of a punishment, and the defaulter cannot be discharged on payment of money, but under Section 5 of the Imperial Act (Section 3 of the local Act) the power to imprison is a means of enforcing a judgment, and not a punishment, as immediately on payment the defaulter is entitled to his discharge—*Cobham* v. *Dalton* (*b*), *Marris* v. *Ingram* (*c*), *In re Kelly* (*d*), *In re Manning* (*e*), *In re Smith, Hand* v. *Andrew* (*f*).

Hayes, for Respondents. The Bankruptcy Act, Section 9, did not prevent the warrant of commitment issuing after the Receiving

(*a*) [illegible] Ex. 95.
(*b*) 44 L.J. Ch. [illegible].
(*c*) L.R. 13 Ch. D. 338.
(*d*) 13 Q.B.D. 329.
(*e*) 20 Ch. D. 480.
(*f*) [illegible] L.J. Ch. 336.

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Order on an order for imprisonment and default thereon, the order and default both having taken place before the Receiving Order, and, in such a case as the present, the plaintiff should have applied for protection under Section 10. The imprisonment is in the nature of a punishment of a fraudulent debtor who can pay and will not —he is in contempt. The offence (*i.e.*, the default) was complete before proceedings in Bankruptcy were taken. *Mitchell* v. *Simpson* (*a*), *Cobham* v. *Dalton* is overruled, and *In re Ryley* does not apply. *Marris* v. *Ingram* and *In re Smith*, *Hand* v. *Andrew* practically support our contention that the imprisonment under Section 3 of the Debtors Act is punitive, and, if punitive, the bankrupt is not protected under Section 9. The plaintiff's claim is bad. His action is not in trespass or false imprisonment, as the issuing of the warrant was the act of the Magistrate. If plaintiff has any action at all it would be malicious prosecution.

Villeneuve Smith, in reply.

STONE, J. As I had not the opportunity of hearing the whole of the argument upon this appeal I do not propose to take any part in the judgment, but I desire to observe that, having considered my judgment and the cases to which my attention was directed in the Court below, I see no reason to alter the conclusion that I then arrived at.

HENSMAN, J. This was an action against solicitors for wrongfully causing the imprisonment of the plaintiff in the gaol at Coolgardie upon a warrant under Section 3 of the Debtors Act, 1871, after a Receiving Order under the Bankruptcy Act, 1892, had been made, of which it is alleged the defendants had knowledge. The defendants in their statement of defence deny the allegations of the claim, and plead also that the plaintiff had not obtained an order restraining proceedings against him under Section 10 of the Bankruptcy Act. The facts, according to the notes of evidence, are somewhat complicated, but, put shortly, they are that the plaintiff, Raynor, brought an action against one Barnes in the Local Court. There was a counterclaim by Barnes, and the judgment went against Raynor on the claim, and for Barnes on the counterclaim. Execution was put in upon certain mineral leases, which were, however, claimed by The Great Hannans Aurora Gold Mining Co.

(*a*) 25 Q.B.D., 183.

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The claim of the company was disallowed, and there was a stay of proceedings, pending an appeal to this Court, upon payment into Court of £60, which represented the amount of the judgment debt and costs. Raynor also appealed to this Court against the Local Court judgment, and there was a stay of proceedings pending this appeal. While those proceedings were going on Barnes' solicitors, who are the defendants in this action, obtained an order under Section 3 of the Debtors Act for payment of the amount of the judgment debt and costs within seven days, otherwise 40 days imprisonment. Raynor filed a petition of bankruptcy in the Bankruptcy Court, and a Receiving Order was made against him, that is to say his property went over to the Official Receiver, who was trustee in the case. Twelve days after this Receiving Order Raynor was arrested on a warrant under the order under the Debtors Act and imprisoned for a short time, being released by the Magistrate who made the order as to imprisonment. All this time the £60 was in Court; it appears to have been afterwards embezzled by an officer of the Court. Evidence was given before the Judge at the trial of this case of the facts above stated. The case was tried with a jury, and at the close of the plaintiff's case, upon application by counsel, the learned Judge entered judgment as upon a non-suit for the defendant. One point with regard to this case was, assuming the order for imprisonment under the Debtors Act to have been wrongfully obtained, were the defendants liable in this action. Generally speaking I am not favourable to technical objections as to form, but this appears to be a matter of substance. This is an action for trespass. The issuing of the order was a judicial act of the Magistrate, and I am of opinion, as the learned Judge was, that trespass will not lie for that, but that the action should have been for malicious prosecution. The next question, however, is, was there evidence fit for the jury in support of this action for false imprisonment. There was evidence that the defendants, by their managing clerk, did obtain a warrant of commitment, and did cause the plaintiff's arrest, and, further, there was evidence that at the time they caused the plaintiff's arrest they knew that a Receiving Order had been obtained against him. The question is, was a non-suit right under these circumstances. An argument has been raised before us that the plaintiff ought to have moved for his discharge under Section 10 of the Bankruptcy Act. Section 9 of that Act enacts that, on the making of a Receiving Order, no creditor to

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whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor, or shall commence any action unless with the leave of the Court. The Receiving Order deprives the debtor, in fact, of his property, because it at once gives over all his property to the Receiver. Section 10 says that the Court may, at any time after the presentation of a bankruptcy petition and before a Receiving Order is made, appoint the Official Receiver to be interim receiver of the property and may, at any time after the presentation of a bankruptcy petition, stay any action, execution, or other legal process against the property or person of the debtor. I am of opinion that if there was a wrongful imprisonment Section 10 does not protect the defendants, and does not qualify the very clear words of Section 9, namely, that after a Receiving Order no person shall have any remedy against the property or person of the debtor. It gives a right to a creditor to apply to the Court, but it does not to my mind alter Section 9. The most important question to be considered in this case is as to the effect of Section 9; and, as my views do not agree with those of the other members of the Court, it is necessary that I should go into the cases bearing on this subject at some length. The first point is, if the Receiving Order protected the plaintiff will an action for trespass lie? I am of opinion that it will, because there would be the disobedience of a Statute. Amongst other cases on this point there is the case of *Brooks* v. *Hodkinson* (*a*) in which it was decided that a plaintiff who issued a writ of *Ca. Sa.* on a judgment for less than £20 was liable to an action for trespass without the writ being first set aside. Martin, B., said, "The plain meaning of the Statute in question is that a man shall not be imprisoned for sums not exceeding £20, and, if he is imprisoned, he may maintain trespass for the unlawful act." The next point to be considered is whether Section 9 protects a bankrupt from arrest? Before dealing with the cases I wish to note the difference between our Act and the English Act. Section 4 of the English Act says, "With the exceptions hereinafter mentioned no person shall, after the commencement of this Act, be imprisoned for debt." Then are given the exceptions. Then follows another section which is exactly similar to our Section 3, but we have no section corresponding with Section 4 of the English Act. Both Acts go on later to speak of those cases where fraudulent debtors

(*a*) 29 L.J., Ex. 93.

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can be imprisoned up to two years with or without hard labour. The first case that was quoted was that of *Cobham* v. *Dalton* (*a*), where it was held that a debtor who is liable to be arrested under Section 4 of the Debtors Act, 1869, is protected from arrest by Section 12 of the Bankruptcy Act, 1869, during the pendency of his bankruptcy or liquidation by arrangement. Section 12 of the Bankruptcy Act of 1869 is the same as Section 9 of our Western Australian Act. James, L.J., in his judgment in that case, said, "I think the debtor is entitled to be discharged from custody. . . . This Section appears to have been intended as a substitute for the old protection order. . . . . I cannot find that the Act has directed any mode in which a process against the bankrupt's person can now be enforced," and Mellish, L.J., said, "It is quite clear that this debt was provable in the bankruptcy, though it is one from which the bankrupt's order of discharge will not release him. It would require very strong reasons to induce us to depart from the plain and natural meaning of Section 12." In the case of *Marris* v. *Ingram* (*b*) it was held that the Debtors Act, while abolishing imprisonment for debt in the case of an honest debtor, is, at the same time, intended for the punishment of a fraudulent or dishonest debtor, and is vindictive. The question in that case was whether a person who was acting as a trustee could be imprisoned. It was held that he was acting in a fiduciary capacity, and, the Court not being satisfied that he had not the means of payment, leave was given to the plaintiff to issue a writ of attachment for non-payment. In the course of his judgment Jessel, M.R., went through the Act, and said that there were two classes of offenders: First, those mentioned in Section 4 (which we have not got), namely, trustees and solicitors and others, and then, he says, "Then we come to a class of more serious offenders, who are dealt with by the 11th and following Sections, and persons falling within that class are to be liable to imprisonment 'with or without hard labour.'" And, after dealing with the facts of the case, the Master of the Rolls continues (p. 344), "This shews the sort of rogue I am dealing with. As to merits he has none whatever, and he ought to be sent to prison unless he has no means, etc." In that case, therefore, although the Master of the Rolls appeared to speak of this Act as being vindictive, at the same time he distinctly says the debtor ought to

(*a*) 44 L J., Ch. 702. (*b*) L.R. 13, Ch. D., 338.

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go to gaol *unless* he has not got the means to pay. The next case is that of *In re Ryley* (*a*). This came before Mr. Justice Cave, and was a case where, after a commitment order had been issued by the Lord Mayor's Court in London against a judgment debtor for default in payment of an instalment, a Receiving Order was made against him under Section 9 of the Act of 1883. It was held that the commitment order was not a process for contempt of Court, but to enforce payment of a debt provable in bankruptcy, and that after the making of the Receiving Order the debtor was privileged from arrest. Cave, J., in his judgment, says "The rule shews that the order of commitment is not a process for contempt, but is simply a method of enforcing payment of a debt. . . . . The commitment order is not a process for contempt, but to enforce the payment of money; and after the Receiving Order that process is suspended, and the creditor has to obtain the debt by the ordinary procedure under the bankruptcy, and has to prove as an ordinary creditor." In the case of *In re Manning* (*b*), decided in 1885, where a debtor had been arrested under an order of the Chancery Division made after the date of the Receiving Order (pronounced before but not drawn up and signed by the Registrar until after the arrest), the debtor was ordered to be discharged. Cotton, L.J., says, "It may be that there were irregularities, and what ought to have been done has not been done; but that does not enable us to depart from the clear words of the Act, which says that after a Receiving Order has been made no creditor shall have any remedy against the property or person of the debtor. Here at the time the debtor was attacked there was a receiving order against him; how can we then say, looking at the words of the Act, that Mr. Justice Kay was wrong in discharging him." Lindley, L.J., in that case says, "The section is express. The order having been made, there were no legal means of putting Mr. Manning in prison." Until the time when this case was decided the authorities seem to be very clear and all on one side. There may be other authorities, but they were not brought before us. The Courts had held that after a Receiving Order was made a person could not be imprisoned for debt. The next case is that of *Mitchell* v. *Simpson*, (*c*), which came before a Divisional Court. The question there decided was that a debtor arrested under this Section of the Debtors Act for making default

(*a*) 15 Q.B D., 329. (*b*) 30 Ch. D., 480.
(*c*) 25 Q.B.D., 3.

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in payment of the debt suffers imprisonment for contumacious conduct, and is not a person arrested by virtue of an "attachment for debt" within the meaning of the Sheriff's Act, 1887. Charles, J., in his judgment said that the case of *In re Ryley* might well be supported upon another ground, because the decision was upon Section 9 of the Bankruptcy Act, 1883, which, in express language, provides that on the making of a Receiving Order no creditor shall have any remedy against the property or person of the Debtor in respect of the debt. This case, although it may appear at first sight to be an authority to the contrary, does not really conflict with the previous decisions. It may be that commitment under a debtor's summons is for punishment as well as for enforcing payment, yet still, when Section 9 intervenes, the debtor is protected. I now come to the last case to which I propose to refer. *In re Smith, Hand* v. *Andrews*, (*a*). The marginal note reads, "The remedy against the property or person of a debtor prohibited by Section 9 of the Bankruptcy Act, 1883, is in respect of a debt and intended to enforce payment of that debt; but the remedy by committal or attachment under the Debtors Act, 1869, is punishment for an offence. Therefore the prohibition contained in the Act of 1883 does not take away the jurisdiction of the Court to order under Section 4, Sub-section 3, of the Act of 1869, the committal or attachment of a defaulting trustee against whom a Receiving Order in Bankruptcy has been made." That is the decision. I am quite aware that in the course of the judgment which was delivered by Lindley, L.J., there are expressions which may bear upon the argument of counsel for the defendant in a favorable manner, but the decision is a decision with regard to a defaulting trustee who is liable to imprisonment for twelve months. I have at some length shewn why I differ from the other members of the Court. There has been no over-ruling of the cases of *Cobham* v. *Dalton* and *In re Manning*, which were decisions by Courts of Appeal. Although the three Judges in *Hand* v. *Andrews* dissented from *Cobham* v. *Dalton* that was not an over-ruling. Such a decision can only be over-ruled by the House of Lords. Our attention has been drawn to no case which over-rules the former decisions. It was put to us during the argument that we were bound by authority. That is so, but as I have pointed out, there is no express authority upon the exact question now before us which is contrary to the opinion I am expressing. On the other

(*a*) 62 L.J. Ch. 336.

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hand there are clear authorities favourable to that view, not overruled by any higher Court. Being entitled to exercise a discretion I prefer the older authorities which appear to me to be of more weight and more to the point now under consideration than some of the later cases. My opinion is that after a Receiving Order had been made this arrest was not lawful, and was in contravention of the Statute. I am aware that the plaintiff in this case filed his petition in order that he might not go to gaol. At the same time it must be borne in mind that there may be many other cases in which, after a man has had an order of committal made against him, he may be forced by others into bankruptcy and thus deprived of the means of paying the debt and obtaining his release from prison. He would thus suffer additional imprisonment through no act of his own. The intention of modern legislation is to do away as much as possible with imprisonment for debt. I think that this arrest was a breach of the Act, and that the plaintiff ought not to have been non-suited.

PENNEFATHER, J. The question for decision is whether a person against whom a Receiving Order in Bankruptcy has been made is liable to be arrested and imprisoned for disobeying an order made against him prior to the bankruptcy by Justices under Section 3 of the Debtors Act, 1871 (34 Vic., No. 31). The answer depends upon the true construction of the above Section and Section 9 of the Bankruptcy Act, 1892. One Barnes recovered judgment against the plaintiff in the Local Court, Coolgardie; the defendants, acting as solicitors for Barnes, caused a judgment summons to be issued against the plaintiff. Upon the hearing of that summons an order under Section 3 of the Debtors Act was made against the plaintiff, and the defendants, for disobedience of that order, caused the plaintiff to be arrested and imprisoned. The plaintiff, subsequently to this order being made but prior to his arrest, caused a Receiving Order in Bankruptcy to be made against himself. The plaintiff contends that, by the operation of Section 9 of the Bankruptcy Act, he is entitled to protection against any proceedings after the date of the Receiving Order, and claims damages from the defendants for their wrongful act in causing him to be arrested. Section 3 of the Debtors Act requires the Justices, before making an order, to have proved to their satisfaction that the debtor either has or has had, since the date of the judgment, the means to satisfy the judgment debt, and has refused or neglected to pay the same. This

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evidence, it must be presumed, was given, for the order of the Justices has not been challenged by the pleadings, and, therefore, must be accepted as a valid order. This section expressly states that no imprisonment under it shall operate as a satisfaction of the debt, but any person imprisoned is entitled to his discharge upon payment of the debt and costs. Now, Section 9 of the Bankruptcy Act provides, amongst other things, that "no creditor to whom the debtor is indebted, in respect of any debt provable in bankruptcy, shall have any remedy against the property or person of the debtor in respect of the debt." I am of opinion the order made on the judgment summons is not a remedy against either the property or person of the debtor within the meaning of the words of this section. The order under the Debtors Act is made to punish the judgment debtor for his contumacious conduct in refusing to pay the amount of his judgment debt when he had the means to do so. This conduct is regarded in the light of a fraudulent act, and the legislature gives the Court power to punish it by imprisonment. True it is that the judgment debtor can escape imprisonment by payment of the debt and costs, but that, I think, can only be regarded as a *locus pœnitentiæ* to escape or mitigate the period of imprisonment. There has been a long chain of judicial decisions on this subject. Some of the earlier cases appear to support the plaintiff's contention that the Act of Bankruptcy bars all proceedings against the bankrupt—*In re Ryley* (*a*). This case has been practically over-ruled by the Court of Appeal in *Mitchell* v. *Simpson* (*b*). In *Marris* v. *Ingram* (*c*) Sir George Jessell says:—"The procedure under the Debtors Act is punitive in character." Lord Esher, M.R., in *Mitchell* v. *Simpson* (*d*), says that "such an order under the Debtors Act is an order that the person against whom it is made shall be imprisoned not merely because he has not paid, or cannot pay a debt, but for an offence for non-payment of a judgment debt which he had the means of paying." That is for a contumacious refusal to obey the order of the Courts after ample warning and opportunity. And at page 189 —"Then is the commitment to prison by a Judge under the Debtors Act the same sort of thing as the attachment for debt with reference to which the Act of George II. was passed?" In the one case the arrest is by the order of a Judge made not merely because

(*a*) 15 Q.B.D., p. 329.
(*b*) 23 Q.B.D., 373, and 25 Q.B.D., 183.
(*c*) 13 C.D., 328.
(*d*) 25 Q.B.D, at page 188.

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a debt is due, but because of a contumacious refusal to pay a judgment debt. In the other it was before judgment, and really at the will of the person sueing out process. In the one case there is what amounts, in my opinion, to an offence against the Court; in the other there was nothing in the nature of an offence. The last case, which reviews all the previous decisions, is that of *In re Smith, Hand* v. *Andrews* (*a*). This case, which was upheld in the Court of Appeal, decided that the remedy against the property or person of a debtor prohibited by Section 9 of the Bankruptcy Act is in respect of a debt, and intended to enforce payment of that debt, but the remedy, by committal under the Debtors' Act, 1889, is punishment for an offence. The case of *Cobham* v. *Dalton* (*b*), relied upon in support of plaintiff's case, was dissented from. If the contention for the plaintiff prevails, then a fraudulent debtor might, by parting with the means to satisfy his debt, set the order of a Court at defiance upon filing his petition in Bankruptcy. To justify this construction of the two sections above referred to, such intention would require to be expressed in clear and unambiguous language. I am, therefore, of opinion that Section 9 of the Bankruptcy Act does not bear the construction sought to be put on it by the Plaintiff, and that this appeal should be dismissed.

Appeal dismissed, with costs.

Solicitors for appellant: *Jones, Smith & Norris.*

Solicitor for respondents: *A. F. Abbott.*

HEPPINGSTONE, PLAINTIFF (RESPONDENT).

THE COMMISSIONER OF RAILWAYS, DEFENDANT (APPELLANT).

1901

May 6.

The C. J. *Hensman*, J.

Railways Act, 1878, 42 *Vic.*, *No.* 31—*Compensation—Further evidence of title—Disability —Inadmissible evidence received without objection.*

The plaintiff was in possession of certain lands which were resumed by the Commissioner of Railways under the Railways Act, 1878. The plaintiff having duly sent in a claim for compensation, and the same having been repudiated by the Commissioner under Section 16 of the Act, certain evidence of title was submitted by the plaintiff to the Commissioner of Railways, and the claim was rejected. At a subsequent trial, before a Judge and jury, under Section 21 of the Act, evidence was given that the plaintiff had been in undisturbed possession of the land for more than 12 years. The jury having found a verdict for the plaintiff, the defendant then made the objection that no evidence of title should have been received other than that already given before the Commissioner. The objection was overruled, and judgment entered for the plaintiff.

(*a*) 1893, 2 Ch. 1. (*b*) 10 Ch. 655

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Held, on a motion for a new trial (1) That where inadmissible evidence is tendered at the trial objection should be taken at the time, and that if not so taken it must be held to have been properly admitted. (2) That the plaintiff having given evidence of 12 years' possession he had shewn grounds for compensation under the Act. (3) That if at the time the period of possession began to run there was any person under disability the onus of proving that fact lies on the defendant.

Quaere: Whether Section 21 of the Act does not preclude the plaintiff from giving evidence of title at the trial other than he gave at the hearing before the Commissioner.

Leake, K.C., for appellant. Section 21 of the Railway Act states that, in an action brought after the Commissioner has repudiated the claim, no further evidence of title shall be given than that which was submitted to the Commissioner. Further, the evidence given at the trial does not establish that the plaintiff is the owner in fee simple by possession as claimed by him in his notice of claim. Twelve years possession does not necessarily give a title, because, if the person entitled at the time when the possessory period began to run was under disability, the twelve years would only be reckoned from the time of the determination of the disability. Here the defendant is bound to prove title, and, therefore, must shew the non-existence of any disability.

W. H. James, for respondent. Evidence, though inadmissible, if allowed to go upon the Judge's notes without objection, must stand. With regard to the disability, the contention of the Crown Counsel really means that the plaintiff must prove a negative. The effect of this would be that no person claiming title under the Statute of Limitations could recover compensation for resumption, because he never would be able to shew that there was no person under a disability having an interest in the land at the time his possession started.

STONE, C. J. This is a motion to set aside a verdict given by the jury, and for a new trial upon the ground (1) that other and further evidence of title to the land resumed, and other and further evidence as to the right to compensation was given than that which the plaintiff had submitted to the Commissioner of Railways, contrary to the provisions of Section 21 of the Railways Act, 1878; and (2) that there was no evidence of title to go to the jury, in the absence of any proof, as to who was the owner of the land at the, time that the plaintiff was alleged to have taken possession; and that such person was then under no legal disability; and (3) that the damages were excessive. Now, with regard to the first point

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it seems to me that it is now too late to take objection to certain evidence that was given in the case in the Court below, even if that evidence was not receivable. I do not think it advisable to express an opinion as to whether it was receivable or not, because I am of opinion clearly that the defendant has allowed all the evidence to be given before the jury, and it is, therefore, now too late to take exception at the close of the case. I can see nothing to interfere with the ordinary rules of evidence, namely, that objection should be taken at the time that the evidence was proposed to be given before the defence can apply for a new trial under that objection. It is true there may be some cases where this rule may not apply, but in this case I see no reason why the ordinary rule should not be followed. It appears that a lot of evidence was given with regard to the plaintiff's title to the particular land in question, and that no objection whatever was raised to that evidence until the conclusion of the case. It also appears that there was no evidence before the Court and jury as to the evidence upon which the plaintiff relied when making his application to the Commissioner of Titles; and, therefore, it is impossible for me to say whether, in the absence of knowledge of what evidence the Commissioner had before him, the plaintiff went beyond the evidence or not. I, therefore, think the defendant is precluded from now raising the point that that evidence was not receivable. The action was a proceeding under the Railways Act for compensation, which arose in consequence of the Commissioner of Railways having taken certain land, of which the plaintiff was in possession. A claim for compensation was made under the 16th Section of the Act, and the plaintiff, in the form of application for compensation, stated that he claimed as owner "in fee simple by possession," and he submitted in support of his said title of owner a certain document The Commissioner was not satisfied with the title shewn. The plaintiff sued for compensation, and the action came on before my brother Hensman and a jury. The jury, after hearing the evidence, returned a verdict for the plaintiff, and assessed his damages. A further point has been taken—that there was no evidence to go to the jury of the plaintiff's title until he had proved who was the owner of the land at the time when he took possession. That, in fact, he should not merely prove that he was in possession throughout the Statutory period, but that he should further prove that the person entitled at the time he proved possession was not

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under a disability. The title under which the plaintiff claims arose from the Statutory possession of twelve years, and it is urged that before he was entitled to recover compensation under such title he should have proved the negative—that no person under legal disability existed at the time he took possession. I am unable to agree with that contention, even if it were necessary to establish his title in fee simple to prove the non-existence of a person under disability at the time when the Statute of Limitations began to run. Yet I entirely agree with Mr. James' contention—that the plaintiff had still a valuable interest by reason of his possession for twelve years, at the time the land was taken by the Commissioner of Railways. Apart from whether that gave him the fee simple or not, it was undoubtedly a valuable, and not only a valuable, but a marketable interest. Anyone would have been glad to purchase such an interest, because, although it was not indefeasible, yet the only defeasible circumstance that it was subject to was that some person might come forward and prove that, at the time the plaintiff's possession began, he was entitled and was under some legal disability. For this reason I am of opinion that the plaintiff had an interest, and had given evidence of his title to such an interest, and that he was called upon to prove nothing more. Had he made application to the Commissioner of Titles for a certificate, he would have got a Certificate of Title without being called upon to prove the negative, which, it is urged, he must now prove before he can obtain compensation from the Commissioner of Railways. I do not know that I need refer to the other points taken in the case, because I think the points I have referred to are sufficient to dismiss this appeal.

HENSMAN, J. I am of the same opinion. I may say that this case appears to me to be very clear, and I have been quite unable to follow the arguments on behalf of the appellant. With regard to the first question, as to whether the plaintiff adduced evidence before the Court below which he had not adduced before the Commissioner, I am clearly of opinion that it is too late to raise that objection after the evidence had been received without objection at the trial, and after the learned Counsel had addressed the jury, and the case was closed. There was nothing before the Court to shew what evidence the plaintiff gave before the Commissioner, and, therefore, it was not possible for the Judge at the trial to know

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whether the plaintiff was giving further evidence or not. It is not necessary to give a decision upon this point, but it appears to me that the section of the Act, which says a plaintiff shall give no further evidence of title, does not mean that he shall call no further witnesses at the trial, but only that he shall not set up a different title. Then as to the next point, that the plaintiff did not prove that there was no one living under some disability who might at some future time come forward. In my opinion it was unnecessary for him to prove this negative, and I agree with the Chief Justice that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Crown Solicitor.*

Solicitors for respondent: *James & Darbyshire.*

ELLIOTT, PLAINTIFF (RESPONDENT).

THE MAYOR AND COUNCILLORS OF PERTH, DEFENDANTS (APPELLANTS).

1901.

May 20.

The C. J.
Hensman, J.
Pennefather, J.

Municipalities Act, 64 *Vic.*, *No.* 8, *Sec.* 55 *and Sec.* 377—*Loan—Poll—Plurality of votes.*

Section 55 of the Municipalities Act, 1900, so far as it is material to this case, is as follows :—" The Mayor and Auditors shall be elected by the persons whose names are on the municipal electoral list in force for the time being within the municipality, and at any such election, and also in voting upon the question of any proposed loan, as hereinafter mentioned, each person shall have a number of votes proportionate to the ratable value of the land of which such person is seized or possessed as owner or occupier, set against his name on the said list." Section 377 of the Act is as follows :—" If no demand is made that the question whether or not such loan be incurred be submitted to the election of the ratepayers, or if, on a poll being taken, a majority of persons voting do not forbid the Council to proceed further with such loan, the Council may proceed to make a special order for borrowing money for the purposes mentioned in such notice."

On a motion to dissolve an injunction obtained by the plaintiff against the City Council restraining them from further proceeding with a loan for £25,000, on the ground that a poll of the ratepayers upon the question had not been properly taken under the Municipalities Act, 1900.

Held, that on a poll of the ratepayers upon a question of any proposed loan each person shall have a number of votes proportionate to the ratable value of the land of which such person is seized or possessed as owner or occupier.

Burt, K.C., for appellants. Section 377 of the Act states that, on a poll being taken on the question of a proposed loan, a majority of persons voting shall determine. Section 55 does say that on such a poll each person shall have a vote proportionate to the value of the land of which such person is seized or possessed as owner or occupier. That is clearly antagonistic to Section 377, and it is a

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rule of construction that in such a case the later section governs. Section 377 was taken from Section 191 of the old Act, but is modified in the direction of making it more explicit that the poll shall be determined by a majority of persons voting, and it is a rule of construction that the language of an Act is never altered in an amending or subsequent Act unless it is intended to alter the meaning. If there was no such intention the same verbiage would have been used.

Parker, K.C., for respondent. Section 55 clearly expresses the intention of the Legislature, and it is a section conferring right in respect of property. Where rights are given by an Act of Parliament they must, if it is intended to take them away, be taken away by express language. To give the effect contended for to Section 377 would be to construe one section of an Act of Parliament contrary to the whole principle of the Act. Although Section 377 is taken from Section 191 of the old Act the marginal note shews that the alteration from the old section was not for the purpose of effecting what has been contended by the appellants, but for the purpose of increasing the proportion of votes that could negative a proposed loan.

Burt, K.C., replied.

STONE, C.J. I think the answer to the question raised depends altogether on the meaning which the Court places upon the words in Section 377—"majority of persons voting." It is urged that those words must be construed according to their ordinary meaning. No doubt it is a rule in construing a Statute, that you are to construe the words in the ordinary meaning of the language or of the subject matter; but still you are not bound, in construing the Act, to take an isolated section and apply that rule strictly to the words used in that section, irrespective of any other section bearing upon the subject matter that this particular section deals with. In this case it is clear that the words used there refer to the matter dealt with by previous sections of the Act. Section 55 directly enacts that in voting upon the question of any proposed loan each person shall have a number of votes proportionate to the value of the ratable land which such person owns or is possessed of. In other words, property is represented and given a vote, and it is sought now to take away the right which property possessed up to

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the passing of that Section. Now, the Legislature, dealing with this particular Section 55, went on, by Section 377, to enact that, at the taking of the poll in respect of a proposed loan, a different ballot-paper should be used to that used when taking a poll with regard to the election of a mayor, councillor, or auditor, but that, at the time of such poll, all the provisions thereinbefore contained with reference to the taking of the poll for mayor should apply as near as may be. Now these provisions with regard to taking a poll at the election of a mayor are contained in Section 101, which provides that every person entitled to vote at the election of a mayor or auditor may, at the election of a mayor, give as many votes as he is entitled to to any one candidate—repeating, in fact, the provisions of the 55th Section. The Legislature, however, go on to enact, after having made provision for the taking of a poll upon the proposed loan, that if, on the poll being taken, a majority of persons voting do not vote against the loan, the Council may proceed to make a special order for dealing with the moneys mentioned in such notice. It appears, that in taking the poll for the proposed loan in question, that the Council have interpreted that section to mean that they were to exclude property altogether, and simply to allow one vote to each person. Whether they were right or not is the question we are now called upon to decide. If that section is read literally, as it is desired the Court should read it, then we have to look to see what machinery the Legislature has provided for carrying out that section in the way it is worded. We have to see whether there is any machinery providing for one vote of a person to be taken at the poll. If we look at these previous sections we find express provision is made with regard to the property vote in regard to the ratable value of the property. Some people are entitled to as many as four votes, and, therefore, if we were to read the Act in the way asked for by Counsel for the appellants we should be met at once with this difficulty, that the Legislature has made no provision for carrying out that section if the ordinary meaning of the words were applied. In other words the section would be ineffective. That is one of the grounds upon which I come to the conclusion that the meaning must be extended in this case beyond the ordinary reading of the words. I am of opinion that, reading those previous sections in conjunction with this Section 377, the Legislature clearly intended a majority of persons to mean a majority of votes. Reference has been made to the wording of the

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191st Section of the previous Act, but, in considering the wording of that Statute, I agree with Mr. Parker, that the intention of the Legislature, as disclosed by the provisions in the sections passed in the new Act, was not to take away the rights which previously existed in the owners of property. By the ordinary rules of construction before a Statute can take away rights previously possessed the wording must be very express.

HENSMAN, J. I am of the same opinion. We are asked to put a construction upon the 377th Section of the Act, and to say what is the meaning of "majority of persons." We must endeavour to arrive at the intention of the Legislature by looking at the Act as a whole. The sections which particularly bear upon the point are—first, Section 55, which provides that, upon the election of mayor and auditors, such officers are elected by persons whose names are in the electoral list; and that at such elections, and also upon voting as to proposed loans, each person shall have a number of votes proportionate to the ratable value of his land—one, two, three, or four—but at the election of councillors each person shall have only one or two votes. That shews that in these important matters of electing councillors, or the equally important question of voting on a loan, persons shall have votes according to the amount of their property, or, in other words, according to their interest in the municipality. Then we come to Section 101, which provides that, at the election of mayor and councillors, ballot papers are to be delivered to the persons coming to vote, that is as many ballot papers as are equal to the number of votes to which such person is entitled to upon the roll of electors. Then comes Section 376, which provides the way in which the voting is to be taken, and which enacts that the voting is to be taken in the same manner as the taking of the poll at the election of mayor, or as nearly as may be. If we stop there, no one could have had the slightest doubt that everyone could vote on the question of whether there should be a loan or not, according to the number of votes that he was entitled to on the list. But now it is to be observed that when we come to Section 376 the matter is concluded, because that shews how the poll is to be taken, and that is really the question we are considering to-day. That is only the mode of taking a poll, because the only section which deals with the giving out of ballot papers is, as far as I know, Section 101, which says you must give out voting papers

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according to the number of votes each person is entitled to, and there is no provision for giving out voting papers limiting each person to one vote and no more. It is said, however, that Section 377 in effect repeals Section 55. If that is so, it must go further and repeal Section 101, and parts of Section 376, which is the section immediately preceding the one under consideration. I am of opinion that cannot be so. I think the meaning of that section is that a majority of persons voting means a majority of votes taken. In my opinion a man possessing one, two, three, or four votes is, by the Act, intended to be considered as one, two, three, or four persons, because as soon as the ballot papers are given to a man you must look to the number of papers cast as votes, and not to the number of persons. This seems to me to be the only common sense way of looking at the Act, and to give a meaning of its intention. That being so, I am of opinion that this appeal should be dismissed, thinking, as I do, that no other construction could possibly be given to that section.

PENNEFATHER, J. I must confess that I had considerable doubt, in the early portion of this argument, as to the way in which Section 377 should be read. I was at first inclined to agree with Mr. Burt that Section 377 should not be interpreted too strictly, but, having regard to the fact that representation under the Act was entirely a property qualification, I cannot but come to the conclusion that if the Legislature had intended to deprive property owners of that right they would have done it in more express and unmistakable language; and for these reasons I am of opinion the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Moorhead, Northmore & Lukin.*

Solicitor for respondent: *F. Bird.*

MAN KIT, DEFENDANT (APPELLANT).

SAMPSON, PLAINTIFF (RESPONDENT).

1901.

May 21.

The C. J.
Hensman, J.

Immigration Restriction Act, 1897—61 *Vic.*, *No.* 13—*The Chinese Immigration Restriction Act*, 1889—53 *Vic.*, *No.* 3—*Onus of proof—Police Magistrate.*

The appellant was charged before the Police Magistrate, Perth, with being a prohibited immigrant, within the meaning of the Immigration Restriction Act, 1897. At the trial Counsel for the appellant objected, (1) that there was no evidence that the accused was an immigrant prohibited in Western Australia; and (2) that the accused did not, according to the evidence, come within the definition of the Act of a prohibited immigrant, as defined by Section 3, and that there was

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no evidence to support the charge. On a special case being stated the Magistrate, as to the first objection, said:—"I considered that there was sufficient evidence, and that the onus lay on the accused to shew that he was not a prohibited immigrant; and, as to the second objection, I decided, considering as I did, that the defendant's statement, as to how he entered the colony, was untrue, that he was a prohibited immigrant who had made his way into, and was found within Western Australia in disregard of the Act, and I convicted him under Section 4 of the Act, and that the onus was on him of proving that he was not a prohibited immigrant."

The questions in the special case to be considered by the Full Court were—(1) Was the Magistrate right in deciding that the onus was on the accused to shew that he was not a prohibited immigrant, as defined in Section 4 of the Act; and (2) was there evidence to shew that the accused came within the definition of a prohibited immigrant.

Held, (1) that the onus of proof, that the accused was a prohibited immigrant, lay upon the prosecution. (2) That the Magistrate having found that the accused was a Chinaman, he could not find him to be a prohibited immigrant within the meaning of the Act, because the Act does not apply to any persons of a class for whom provision has been made by law, and provision has been made by law for the immigration into this colony of Chinese.

Downing, for appellent.

Crown Solicitor, for respondent.

STONE, C.J. In this case the appellant was charged with and convicted for being a prohibited immigrant within the meaning of the Immigration Restriction Act, 1897. Before he could be convicted upon such a charge it was incumbent upon those who desired a conviction against him to prove that he came within the definition of Section 3 of that Act. There was not a tittle of evidence before the Magistrate upon which he could come to the conclusion that the accused was a prohibited immigrant within the meaning of that Section. The Magistrate says that he convicted the appellant under Section 4 of the Act. That is the section which provides for the penalty to be imposed upon a person, or the imprisonment to be imposed upon a person who is a prohibited immigrant making his way into or found in Western Australia in disregard of the Act. But it is necessary, before he can be convicted under that section, that there should be some evidence before the Magistrate upon which he can come to the conclusion that he was a prohibited immigrant within the meaning of the Act. I need not repeat the Sub-sections of Section 3, defining a prohibited immigrant. It is clear that there was no evidence at all before the Magistrate which brought the appellant within the meaning of this sub-section. The Magistrate asks whether he was right in deciding that the onus of proof that he was not a prohibited immigrant was upon the accused. It is hardly necessary to say that there is nothing in the Act which throws that onus upon the

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accused. He is to be tried by the ordinary rules of criminal procedure, which require that he is not bound to prove his innocence, but that the other side is bound to prove his guilt. The person accusing him is bound to prove his guilt, and, therefore, the Magistrate, in coming to that conclusion, was clearly wrong. I do not think it necessary to deal with the first question raised by the Magistrate in this case, because my view of the other questions disposes of this appeal. There is, however, another point which has been raised incidentally, and upon which I desire to express an opinion, and that is the point referred to by the Crown Solicitor, which was decided by Mr. Justice Hensman upon a case before him in Chambers, upon an application for a *habeas corpus*, and I may say from what fell from Mr. Justice Hensman, and also from the Crown Solicitor, I entirely agree with the view of my brother Hensman as to the meaning of Section 2 of The Immigration Restriction Act as read in conjunction with the Act of 1889. I think the words in Clause B of Section 2 of the Act of 1897—"Any person of a class for whose immigration into Western Australia provision has been made by law, or by a scheme approved by the Governor"—must be taken to apply to races as well as to the particular classes to which the Crown Solicitor has drawn our attention. I think the Chinese Immigration Restriction Act was clearly in the nature of legislation in regard to a particular class, that is, Chinese exclusively, a class not including any other race, and, therefore, the exception in the Act seems to me to apply to that particular class of people, and upon that ground also the proceedings against this particular appellant were wrong, because he belonged to a class for whose immigration into Western Australia provision had already been made by law, and, therefore, the provisions of the Immigration Act of 1897 do not apply to him. I, therefore, answer the questions of the Magistrate as follows:—There was no evidence that the accused was a prohibited immigrant; the Magistrate was wrong in deciding that the onus, under the circumstances, was on the accused to shew that he was not. The conviction should be set aside.

HENSMAN, J. I am of the same opinion. The Magistrate appears to have come to the conclusion, from the evidence, that the defendant was a Chinaman, and I am not prepared to differ from him in that respect. There was some evidence, and the Magistrate was entitled to draw the conclusion that he was a Chinaman. That

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being so, he did not come within the Act of 1897, because that Act says—"That it shall not apply to any person of a class for whom provision has been made by law." Provision has been made by law, and still remains on the Statute Book, regulating the immigration to this colony of Chinese; and, therefore, there was evidence before the Magistrate that this man was not a prohibited immigrant. Apart from this objection, was there any evidence that he came under any of the Sub-sections of Section 3. The Crown Solicitor has very frankly told us that he could make no sense at all of the first sub-section. I quite agree with the Crown Solicitor. It is nonsense. One cannot understand what it means. Then follow a number of statements defining who shall be prohibited immigrants. There was no evidence whatever that this man came within any of those definitions. The Magistrate seems, for some reason or another, to have come to the conclusion that it was upon the defendant to prove his innocence. I do not know for what reason the Magistrate came to that conclusion. It is hardly necessary to say that if a Chinaman is not deprived of his rights by Statute, he is just as much entitled to the full benefit of the laws of England as an Englishman or an Australian, and it is one of our principles that you must prove a man to be guilty before you can convict him of an offence. I agree with what has been said—that there was no evidence to support the conviction.

Special case remitted to the Magistrate with questions therein answered as above.

Solicitors for appellant: *Ewing & Downing.*

1901

May 21.

The C. J.
Hensman, J.

THE MAYOR, COUNCILLORS AND CITIZENS OF BULONG, PLAINTIFFS (RESPONDENTS).

COHN, DEFENDANT (APPELLANT).

The Municipal Institutions Act, 1895—59 *Vic.*, *No.* 10, *Sections* 164, 173, 174—*Recovery of Rates—Owner—Occupier.*

Where there is an occupier of premises at the time of the striking of a rate under the Municipal Institutions Act, 1895, it is necessary to proceed for the recovery of such rate by levying a distraint upon the goods of the occupier before proceeding to recover the amount payable from the owner of the premises. The word "occupier," within the meaning of the Act, does not include a sleeping partner.

THIS was a motion to set aside the judgment of the Bulong Local Court, given under the following circumstances: the defendant was the owner of certain premises at Bulong, in respect

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of which rates had been struck. At the time of the striking of the rates, one A. was in occupation of the premises as tenant. Notice was served upon A., as occupier, calling upon him to pay the rates. A. disregarded this notice, and subsequently quitted the premises without paying. The plaintiffs then took action against the defendant and obtained a verdict.

On Appeal.

Haynes, for appellant. Section 164 of the Municipal Institutions Act requires that all remedies by distress should be exhausted against the occupier at the time of striking the rates, or any subsequent occupier within twelve months, before the owner can become liable. Here there has been no previous distress against the occupier.

Downing, for respondent. At the time the owner was proceeded against the occupier had left, and there was no subsequent occupier within the year for which rates had been struck. The Act does not say that the Municipality is bound to proceed by distress at once. A period of twelve months is allowed, and if there was no occupier at the time distress could have been made, the owner might have been proceeded against. Moreover the appellant was a sleeping partner with A. and therefore himself the occupier.

Haynes, in reply. From Sections 173 and 174 it would appear that the Act did not contemplate a sleeping partner as an occupier.

HENSMAN, J., delivered the judgment of the Court as follows :—The Court is of opinion that the appellant is not liable for the rates and that the judgment of the lower Court should be reversed. It appears that a person named Ascher was *de facto* the occupier of the premises at the time the rates became due and payable. He quitted the premises without any distress having been made upon his goods, and without anything further having been done than the service of a notice of demand upon him. It also appears that there was no subsequent occupier of the premises during the period for which the rates were struck. After Ascher had quitted, and whilst there was no one else in occupation, these proceedings were taken against the owner. It is contended on these facts—firstly, that everything had been done under Section

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THE MAYOR, COUNCILLORS AND CITIZENS OF BULONG v. COHN.

164 to render the owner liable, and secondly, that in any event the appellant was himself the occupier within the meaning of the Act, he being a sleeping partner of Ascher's. As to the first contention the Court is of opinion that the true construction of Section 164, of the Municipal Institutions Act is that before the owner can be made liable for the amount of the rate, it is necessary for the Municipality to exhaust their remedy by distress against the occupier at the time of striking the rate, or against any subsequent occupier within twelve months. This may be considered somewhat hard upon Municipalities, because it may impose upon them the necessity of levying their distress very soon after the rate becomes due. The Council, however, is well protected by the Act, since they can always fall back upon the remedy which enables them to sell the land for the rates due, and the expense they are put to, if the rates are not paid within eighteen months. As regards the second point, it is quite clear to the Court that occupation, within the meaning of the Act, does not include a mere sleeping partner.

Appeal allowed.

Solicitors for the appellant: *Haynes & Purkiss.*

Solicitors for the respondents: *Ewing & Downing.*

1901.

May 24.

The C. J. *Hensman*, J.

IN RE MAHON.

Criminal Libel—Private Prosecutor—"Fiat" of Attorney General—Costs.

D. having obtained the "fiat" of the Attorney General to institute proceedings for criminal libel against M., a prosecution was accordingly instituted by D., and on the trial the jury returned a verdict of not guilty. An application for costs made by the defendant M. was refused, on the ground that the prosecution was by the Crown. The defendant then applied to the Supreme Court for a writ of *mandamus* to compel the Magistrates to award him costs.

Held, that the defendant was entitled to his costs, as the mere fact of the "fiat" of the Attorney General being asked for and obtained did not make the prosecution a public one.

On application for the writ, *R. B. Burnside*, the Crown Solicitor, shewed cause. It was a public prosecution, as the Attorney General issued the "fiat." He was no doubt moved to do so by a private individual, but that is so in many prosecutions, *e.g.*, for murder and other crimes.

V. F. Smith in support.

STONE, C.J. If the Magistrates sitting at Quarter Sessions refused to allow the defendant his costs because the information

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against him was filed in the name of the Attorney General, I think the Magistrates were in error, because, from the facts placed before me, it appears clear that this was a private prosecution, at the suit of one Patterson, who thought he had been libelled by the defendant in his newspaper. The fact of the Attorney General or the Crown Law Officers taking up the case for him did not convert the prosecution into a public prosecution. The Act distinctly provides that no private prosecution for a libel can take place except upon the fiat of the Attorney General. The Attorney General is in a position, in the case of certain libels, to file an information himself, although it is generally the duty of the private individual to do so, who, however, before he can lay the information must obtain permission from the Attorney General. Although our Act provides that true bills shall be found by the Attorney General, or someone acting for him, still the prosecution may be a prosecution at the suit of a private individual, and not at the suit of the Crown, and, as the Act under which the prosecution took place allows the defendant his costs, in the event of a verdict being given in his favour, the defendant was clearly entitled to those costs. There are many important cases instituted by the Crown for the good government of the country. The Crown Solicitor instances the case of a prosecution for murder, where, although the information may be laid by a private individual, still the proceedings are really at the suit of the Crown, and in that case no costs would be given in the event of a prosecution failing. In this case, however, I think it is clear that it was a private prosecution, although the private prosecutor, in the course of the suit, appears to have obtained some assistance from the Crown Law Department. The information was filed in the name of the Attorney General in the same way that informations for libel or indictments for libel in England are in the name of the Grand Jury. Here the Attorney General takes the place of the Grand Jury, and instead of the information commencing as it does in England, the Attorney General comes into the Court and finds a Bill. That fact, however, under our Statute, does not turn the prosecution into a public prosecution, and the Magistrates were wrong in this case. I presume there will be no occasion for a writ to go.

HENSMAN, J. I am of the same opinion. The only point we have to decide in this case is whether it was a private prosecution or a prosecution for the Crown. The mere fact that in this case

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the individual asked the Attorney General to prosecute shews me by itself that this was a private prosecution; the Attorney General could not have had any occasion to ask himself whether he should prosecute or not. The case to my mind is absolutely clear.

Appeal allowed.

Solicitors for appellant: *Jones, Smith & Norris.*

Solicitor for respondent: *Crown Solicitor.*

1901

May 24.

REX *v.* HAHN.

Police Act, 1892, Sec. 49 and Sec. 69—Information under Sec. 69—Conviction—Certiorari—Evidence.

The C. J. Hensman, J.

Section 69 must be read with, and is supplemental to, Section 49 of the Police Act, 1892, both Sections relating to the accused having anything which may be reasonably suspected of having been stolen or unlawfully obtained in his personal possession in a street or place, and not to his possession in a house. *Hadley* v. *Perks* (*a*), followed.

Where *certiorari* is not taken away it is open to the Court to deal with the evidence, and the Court may see if there was any evidence which would support the conviction, if the Magistrates had jurisdiction, and if there is no such evidence the Court should quash the conviction.

Objections that a conviction does not follow the information, and that the information does not disclose an offence, if not raised on the appeal to Quarter Sessions, preclude the applicant, for a Writ of *Certiorari*, from raising them before the Full Court.

THE appellant in this case was apprehended by a constable at Kalgoorlie, without a warrant, and was informed against under Section 69 of the Police Act, 1892, for having in his closet a quantity of zinc slimes, reasonably suspected of having been stolen.

The defendant was charged in the information "That he had at Boulder City in a certain place (to wit, his closet on his premises situate in Piesse-street) a quantity of zinc slimes, containing gold, reasonably suspected of being stolen or unlawfully obtained, etc." The evidence shewed that the slimes were found in a water closet on the defendant's land, but they were not found in his personal possession, nor did he use the closet in which they were found. The defendant was convicted and the conviction was framed as follows:—"That he (the defendant) on the 24th day of October, 1900, at Boulder City, was in possession of a quantity of zinc slimes, containing gold, which might be reasonably suspected of being stolen or unlawfully obtained, etc., and has not given an account to our satisfaction how he came by same, etc."

(*a*) 55 L. J. Mag. Cas., 177.

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The defendant appealed to Quarter Sessions, where the conviction was upheld; a rule for *certiorari* having been obtained.

On the return of the Rule.

Villeneuve Smith, for accused. The conviction does not disclose an offence, as it states "On the 24th October, at Boulder City, the accused was in possession of." The information was laid under Section 69 of the Police Act, which does not contain the words "having in his possession." The conviction cannot be for a different offence to that charged in the information. *Hadley* v. *Perks* (*a*). To support the conviction the words "having in his possession" must be *ejusdem generis* with "conveying."

The Crown Solicitor (*Burnside*), contra.

Smith, in reply.

STONE, C.J. With the objection taken by the Crown Solicitor that the applicant for this Writ of *certiorari* has no right to raise objections to the conviction that were not raised in the Court below, I entirely agree. In *Short and Mellor*, on Crown Office practice, it is said that it is a general rule that the Court will not accept objections to want of jurisdiction not appearing on the face of the proceedings, more especially if they might have been brought before the Quarter Sessions on appeal from the Police Court. With regard, however, to the question as to want of jurisdiction, or excess of jurisdiction, the applicant is clearly entitled to take that objection now. The points raised in this case were recently raised before me in Chambers upon an application for a Writ of *Habeas Corpus*. The facts there were very similar to the facts before us to-day; and during the course of the argument upon these two sections of the Police Act, which have been called in question to-day, I threw out that I had always been under the impression that this section applied to persons roaming about a town or public place, and who were found in possession of property reasonably supposed to have been stolen. In the course of that application Mr. Leake drew my attention to the case of *Hadley* v. *Perks*, which is now relied upon by Mr. Smith, and upon looking at that case it struck me that it was a case strongly in point, and was one I was bound to follow, and I therefore allowed a writ to issue. The case seems to me to be on all fours with the case of *Hadley* v. *Perks*, and therefore I think it

(*a*) Supra.

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necessary to go rather fully into that case and to read portions of the judgments that were given. I may say that the point taken by the Crown Solicitor, that the 69th Section of our Police Act differs from the English Act in that it uses the words "or in any place," which are omitted from the English Act, was also drawn to my attention by Mr. Moorhead, in Chambers, where I drew a distinction which I propose to endeavour to draw now. I pointed out that there was also another difference in the wording of the 69th Section of the Police Act to the English Act, inasmuch as the words in our section are "every person who shall be brought before any Justice charged with having on his person or in any place"; whereas in the English Act the words are "charged with having in his possession or having in any manner." I am of opinion that the words "on his person or in any place" mean nothing more or less than "having in his possession" as used in the English Act. If that be so the case of *Hadley* v. *Perks* disposes of the question. The point raised in that case was whether the Lord Mayor, before whom the case was tried, had jurisdiction to deal with it under the circumstances. The information in that case was very similarly worded to the information now before us. In *Hadley* v. *Perks* the information was to the effect that the accused unlawfully had in their possession, and contrary to the Statute, goods, to wit, nine sacks and fourteen sacks respectively, the property of the respondent, which goods were reasonably suspected to have been stolen. That you will see is almost identical with the information in the present case. The information was laid under the Metropolitan Police Act, which has a section very similar to the section of our Police Act. It states that every person who shall be brought before a Magistrate charged with having in his possession, or having in any manner anything which is reasonably supposed to be stolen, and who shall not give an account to the satisfaction of the Magistrate as to how he became possessed of the same, shall be liable to a penalty of £5 or a term of imprisonment. In that case the Counsel for the appellants objected to the Lord Mayor's jurisdiction upon the ground that the English Act, 2 and 3 Vic., Cap. 71, Sec. 24, which is similar to Section 69 of our Police Act, 1892, created no offence, but that the offence was created by Section 66 of the Police Act, 2 and 3 Vic., C. 47, contending that these two Acts were to be construed together as one Act. Now there is no point in the fact that these two Acts are to be

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construed together in this case, because we find these two sections alluded to in the English Statute, and although they appear in different Acts, they are both inserted in our Police Act. The only distinction in the English case was that one section was inserted in one Act and another in a subsequent Act; whereas here we find them both inserted in one Act, namely, the Police Act, 1892. The case came on before the Court of Appeal, and was argued for the appellants by Sergeant Parry. I refer to his arguments because they have great bearing on this case. He first of all starts with the admission that by Section 55 of the later Act, the two Acts are to read as one, and after considerable argument the Court held that the summary powers conferred by Section 24 of the 2 and 3 Vic., C. 71, upon the Metropolitan Magistrates of dealing with a person brought before any of the said Magistrates, charged with having in his possession, or conveying in any manner, anything which might be reasonably suspected of being stolen or unlawfully obtained, do not apply to a case where the only possession of the property is a possession inside a warehouse, but are confined to the class of offences contemplated by Section 66 of the 2 and 3 Vic., C. 47. To bring a case within Section 24 the "having in his possession" must be *ejusdem generis* with "conveying."

Now the facts connected with that case seem to apply with great force to the circumstances under which this writ is asked for. The only distinction between the English Act and our Act is that which I have endeavoured to point out and to explain with regard to the words "or in any place"; but I think a careful reading of that Section will shew that it means "having in his possession." Therefore, upon the point of jurisdiction, I am of opinion that there was an excess of jurisdiction in the Magistrates, and that the charge against the defendant did not come within the class of case intended to be met by Sections 49 and 69 of our Act. There is another point upon which I think it is right I should say a few words, and that is with regard to the evidence. It is open to this Court, where the right of *certiorari* is not taken away, to deal with the question of evidence, and so, if there was any evidence, we have the right to see whether there was evidence upon which the defendant could be convicted, if the Magistrates had jurisdiction to deal with the case. The facts of the case are very short. The defendant was charged in the information that he had in a certain place, to wit, his closet on his premises, a quantity of zinc slimes

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reasonably suspected of having been stolen. It appears from the evidence that the defendant was the owner of three houses to which were attached three different closets, that he was not the occupier of the house to which the particular closet in which these slimes were found was attached, but that closet belonged to a house rented from him. Therefore there is no evidence to shew that the defendant was in the habit of using this particular closet or that he had the key of it. It appears that at the time the police constable searched his premises he endeavoured to find the key of that closet, but was unable to do so, and it further appears that the previous tenant had had access to that closet, and if he had we may presume that he had possession of the key. If that was so, and that the defendant was unable to find the key, it may be that the other tenant had mislaid it or taken it away with him, and that at the time these slimes were found the former tenant may have still had access to the closet although the defendant had not. It therefore appears to me that there was no evidence before the Magistrate to shew that the defendant had in any way access to the closet in question, and therefore I cannot see how the Magistrates could come to the conclusion that the defendant was in possession of those premises upon which the goods reasonably suspected of being stolen were found. Indeed, the evidence is rather the other way, because the house was in the possession of someone else, and therefore anyone might have had access to this closet. It further appears that the ground was open at the back, and anyone might have had access to these closets. It therefore seems to me that even if the Magistrates had jurisdiction, it would be very hard to hold a person responsible for goods found somewhere near the premises under the circumstances detailed. For these reasons I am of opinion that the Writ should issue.

HENSMAN, J. I am of the same opinion. I quite agree with what has been said in argument, that it is not, as a rule, open to a party asking for a writ of *certiorari*, to bring forward fresh points that were not taken in the Court below. At the same time if there is a want of jurisdiction, that point may always be taken, because a party cannot waive a want of jurisdiction. The facts are that these goods were found in a closet, not attached to the premises occupied by the defendant, and he has been convicted of having in this closet goods reasonably suspected of having been stolen or unlawfully obtained. If the words in the Police Act had been the same as

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those in the English Statute, the case would certainly have been clear upon the authority of the case of *Hadley* v. *Perks*. Unfortunately, however, the draftsman here has thought fit to use words which were not in the English Act. These words have created some difficulty, but on the whole I am not prepared to differ from the view of the Chief Justice, that the charge against the defendant was not within the meaning of the section under which he was convicted, and that therefore there was a want, or excess of jurisdiction. I further agree that there was no evidence to shew that the defendant was in possession of this property. It was not proved that the defendant had ever been near the closet, or that he had used it in any way, or that he had the key of it. Indeed, it was shewn that the previous tenant had had the key, and it was not proved to have been handed over to the defendant. Even apart from the first point I am of opinion that there was no evidence to shew that the property was in the defendant's possession. I think the writ should issue.

Rule absolute.

Solicitors for appellant: *Jones, Smith & Norris.*

Solicitor for Crown: *R. B. Burnside.*

SCOTT, PLAINTIFF (RESPONDENT).

SAMPSON AND ANOTHER, DEFENDANTS (RESPONDENTS).

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May 31.

The C. J,
Hensman, J.

Local Court—Appeal—Order of Magistrate—Filing with Notice of Appeal.

On appeal from the Local Court it is necessary before setting down the appeal that the order of the Local Court Magistrate should be taken out and filed with the notice of appeal.

On an appeal from the Local Court, *Leake, K.C.*, raised the preliminary objection that the original judgment was not filed with the notice of appeal.

Forster, contra.

STONE, C.J. It is very desirable that the rules of the Court should be adhered to. In this case there has been a grave irregularity, because not only has the rule not been observed as regards the setting down of the appeal, but it appears that the order was not drawn up until the appeal came into Court to-day. Now the first thing the appellant is required to do is to draw up the order and then give notice of his appeal, and then set the appeal down by taking a copy of the notice and the order, and filing them

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with the proper officer. In this case the officer of the Court appears to have made a mistake, because he has set down the appeal before getting the original order. One does not wish to see injustice done to a suitor by reason of these errors, more particularly as the error was both on the part of the Solicitor in charge of the appeal and on the part of the officer of the Court. Under these circumstances I think an opportunity should be given to the appellant to set his appeal down properly, and that the time should be extended to allow him to do so. Nothing appears to me to be gained by postponing this question, but it is very essential that when we have rules they should, as far as possible, be observed.

HENSMAN, J. I concur.

Leave granted.

Solicitor for appellants: *W. T. Forster.*

Solicitors for respondent: *Geo. Leake & Co.*

1901.

June 6.

The C. J. *Hensman*, J.

HANNANS SAW MILLING CO., LTD., PLAINTIFF (RESPONDENT).

COMMISSIONER OF RAILWAYS, DEFENDANT (APPELLANT.)

The Railways Act, 1878, 42 *Vic. No.* 31—*Common Carrier contracting out of Liability.*

By Section 29 of the Railways Act, 1878, the Commissioner of Railways for Western Australia is to be deemed to be a common carrier.

The plaintiff consigned certain machinery to Kalgoorlie, and signed a consignment note requesting the Commissioner to receive the machinery for conveyance at owner's risk, and in consideration of the Commissioner charging a reduced rate, undertaking all risks of loading, and declaring that the Commissioner was not to be held liable for any loss, damage, or injury whatsoever or howsoever occasioned, except by the wilful negligence of the Commissioner or his servants. The Commissioner did not sign this consignment note, but signed a receipt on the ordinary form whereby he became assurer of the goods consigned, and omitted to alter it in the special terms set forth in the consignment note. In transit the machinery was damaged, and the plaintiff thereupon claimed damages, which were awarded him in the Local Court. At the hearing in the Local Court no evidence was given as to wilful negligence. The defendant appealed.

On Appeal.

Held (1) That the Commissioner has power to contract himself out of his liability as a common carrier. (2) That the receipt signed by the Commissioner not having been altered to agree with the special terms of the consignment note, there was no special contract limiting his liability as a common carrier.

The Crown Solicitor (*Burnside*), for appellant.

James, for respondent.

STONE, C.J. I am not prepared to differ from the Crown Solicitor in his view of the law with regard to the common law

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right of the Commissioner for Railways to contract himself out of his liability as a common carrier. In this case, however, the question is whether he has done so or not. It is quite true that, as urged by the Crown Solicitor, the Commissioner of Railways is not bound to give any receipt for goods. The application for a consignment note in the form given by the by-laws is quite sufficient as a contract, and if the Commissioner had been satisfied with that application, he would clearly have not been liable under the circumstances mentioned in the evidence before the Lower Court, because it would have been necessary for the plaintiffs to prove that the Commissioner or his agents had been guilty of wilful negligence. The Commissioner, however, does not seem to have been satisfied with that mere request which relieved him of his liability as a common carrier and created a special contract between him and the owner, but gave the consignor a receipt, and had he contented himself with giving a receipt as set forth in the counterfoil of the note, he would not have been liable except for wilful negligence. Instead of that, however, he went out of his way and gave a special receipt, striking out that particular part of the receipt which provided that the goods were to be carried at the owner's risk, and that the Commissioner was not to be liable except for wilful negligence, and inserting in another place the words "Subject to the Regulations, as per Merchandise and Live Stock Rates Book." In consequence of this departure there was a promise on the part of the Commissioner to carry goods in the way mentioned in the counterfoil of the consignment note, which differed from the request of the consignor, which would otherwise have formed the contract between the parties. There was, therefore, a variation of the contract which would otherwise have existed, and the parties consequently were not *ad idem* as to the terms upon which these goods were to be carried. There was no evidence in the Court below, nor are we seized of the fact as to whether the goods were carried at a lower rate or at the ordinary rate; but whether they were or not it is clear, I think, from these circumstances that the parties were not *ad idem* in respect of the special contract, and therefore there was no special contract between them. There being no special contract between them, and the Commissioner having accepted and carried the goods, he is thrown back upon his liability as a common carrier, and the consignor is entitled to recover in the event of the goods being damaged. For these reasons I am of opinion that the appeal should be dismissed.

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HENSMAN, J. I am of the same opinion. This is an action against the Commissioner of Railways for damage to goods while they were being carried by him. At Common Law a common carrier is an insurer of goods with certain exceptions, and the Railways Act of this colony makes the Commissioner a common carrier. It appears that the Commissioner is in the habit of entering into special contracts with owners of goods, in which he agrees to take goods at a lower rate of carriage on the condition that he is only to be held liable for the wilful negligence of himself or his servants. He has two forms of contract; one which is called an ordinary consignment note for goods, and another a consignment note for goods carried at owner's risk. In the present case the consignor requested the Commissioner on the proper form to receive the goods and carry them at owner's risk. The Commissioner gave a receipt on the ordinary form as for goods carried in the ordinary way by a carrier. That being so, there was no special contract, that is to receive a smaller sum and to have the goods carried at owner's risk. The goods were carried by the Commissioner in the ordinary way, and they were received by the consignee in a damaged condition. I am of opinion under these circumstances that the Commissioner was liable. I quite agree with the Crown Solicitor that it is competent for the Commissioner to contract himself out of his Common Law liability, but he has not done so in this case, and I am of opinion that the Court was right in giving the plaintiff damages.

Appeal dismissed.

Solicitor for appellant: *Crown Solicitor.*

Solicitors for respondents: *Henning & Brown.*

1901.

June 6.

The C. J.
Hensman, J.

SULLIVAN, PLAINTIFF (APPELLANT).

HARRIS, DEFENDANT (RESPONDENT).

Adjournment of trial—Costs of the day—Condition precedent.

The plaintiff, in an action set down for hearing, applied for an adjournment, producing an affidavit in support of his application. After hearing the parties the learned Judge granted the adjournment on the terms (1) That the applicant should pay the costs of the adjournment within seven days of taxation. And (2) That such payment should be a condition precedent to the plaintiff bringing on the action for trial. Against the latter condition the plaintiff appealed.

Held, that the second part of the order should be reversed, as the payment of

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costs in such a case should not have been made a condition precedent to proceeding.

Appellant in person.

Purkiss, for respondent.

STONE, C.J. This is an appeal not only in respect of the allowance of certain costs, by the Judge in the Court below, but also an appeal involving a question as to whether the learned Judge was right in imposing terms in respect of those costs, that is, that the payment of those costs should be a condition of the adjournment, which the learned Judge granted on the application of the plaintiff. Now, with regard to costs, it is well recognised that there is no appeal against the discretion exercised by a Judge in awarding or withholding costs. There must be some principle involved —the Judge must have gone upon some wrong principle, or have misapprehended the facts before him, before a party can question his decision. Therefore the question arises in this case whether there has not been something more than the exercise of the Judge's discretion in the order which was made. The plaintiff being in default, made an application for an adjournment of his trial, and, under the circumstances brought to our notice in the affidavits, I am not prepared to differ, even if I had power to express a judicial opinion on the subject, from the learned Judge, in the discretion he exercised, awarding the costs of the day to the defendant. The plaintiff had clearly put himself in the wrong, and, under the circumstances, he must be expected to pay any costs that the defendant had incurred, or been put to, by reason of the trial not coming on upon the day on which it was fixed. But another question arises, whether the Judge should, in giving the costs to the defendant of the adjournment, also make it a condition that those costs must be paid first. Such an order in effect would prevent the plaintiff proceeding with his action, in the event of his being unable to comply with that order, and that seems to me to involve a very grave question—whether a plaintiff should, when he has obtained an order for an adjournment, be precluded from proceeding with his action, and otherwise be deprived of the remedy he seeks, in the event of his not paying these costs. Speaking of my own practice here, I do not know that I have ever made an order upon an application for an adjournment, where it has been sought to make the order for costs a condition precedent, nor do I remember such an application being made. The usual order is that the party in default pays the costs,

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and the party in whose favor those costs are payable has his remedy. I should not like, except under special circumstances, to deprive a plaintiff of his right of action, because he had been compelled to apply for an adjournment. I think that would be placing him in a very hard position, but I can quite understand that there might be such circumstances that would make it very desirable for the Judge to impose such a condition. Contumacy on the part of the plaintiff, or an effort made by a plaintiff to make away with his property, in order to defeat the defendant in the event of the action being decided against him, or the motion being decided against him —these might be such circumstances as would justify the Judge, I think, in taking into consideration whether he should not make an order a condition precedent. But there seem to me to be no special circumstances in this case. They are the ordinary circumstances under which a plaintiff usually applies for an adjournment—that is, that he is not prepared on that particular day with his witnesses, or with his jury, to proceed to trial. It is clear from the facts which have been brought to our notice, that the plaintiff had all along, up to a certain time, at any rate, been anxious that his case should be tried; that he had been watching the list, and had his jury in attendance, but he appears to have got tired of waiting for his case to come on—he was put off from day to day. The plaintiff made a mistake in getting the Sheriff to countermand the jury. The Sheriff, at any rate, also made a mistake in countermanding the jury at the instance of the plaintiff, because the jury were for the defendant as well as for the plaintiff, and no countermand should have been made unless with the consent of both parties, or unless the plaintiff intended to withdraw the action. I do not think there were any special circumstances in this case which would justify a Judge in making such an order. I think this was an unusual order to make, and therefore it is one, in my judgment, which this Court ought not to support. An order as to costs, I think, the Court should be slow to interfere with. It is only the order, with regard to the condition precedent that can be interfered with. I think the order of the learned Judge should be amended in this respect, and that it should be an order simply giving the costs of the adjournment to the defendant.

HENSMAN, J. I am of the same opinion. It is well settled that the Court will not interfere with the discretion which a Judge has in the matter of costs, unless, amongst other things, he

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has decided contrary to some principle. In the present case, I agree with what has been said, that the plaintiff was wrong in countermanding the jury, and that being one of the main causes which led to the case not being ready for trial on April 3. I do not think it right to say that the learned Judge exercised a wrong judicial discretion on the point of ordering the plaintiff to pay the costs of the adjournment. The latter part of the order, which the Court proposes to set aside, is very stringent. It reads, "And it is further ordered that the taxed costs be paid, within seven days of taxation, by the plaintiff to the defendant's solicitors, Messrs. Haynes & Purkiss, the 'said' payment to be a condition precedent to the plaintiff bringing the action on for trial." The payment of the costs within seven days of taxation appears to be a condition precedent to going on with the action. It is merely a case of an ordinary adjournment, on the terms of paying the costs of the day. I cannot remember any case in which I have been asked to make such an order as the present one. In this country, such is the difficulty of collecting witnesses in many cases, that the Court always does its best to assist the parties to overcome those difficulties. Even when a Court of Appeal requires security before an appeal can be heard the Court never fixes the time during which security must be given. The practice is that unless the security is given within a reasonable time the other side can move to dismiss the appeal. It appears to me that this order does involve a question of principle, and that the appeal ought to be allowed.

Appeal allowed.

Appellant in person.

Solicitors for respondent: *Haynes & Purkiss.*

WEISS, PLAINTIFF (APPELLANT).
EMMETT, DEFENDANT (RESPONDENT).

1901.

June 7.

Local Court—Change of venue—Mode of application.

The C. J. *Hensman*, J.

The defendant made application to the Master in Chambers for a change of venue. The Master ordered that the case should be heard in Perth. Against this order the defendant appealed to the Chief Justice in Chambers, who changed the venue to Kalgoorlie. The plaintiff appealed to the Full Court.

Held, that both orders were wrong, inasmuch as the original application should have been made to the Chief Justice.

Appellant in person.

Moorhead, K.C., for respondent.

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WEISS v. EMMETT.

STONE, C. J. In my opinion the whole of the proceedings taken up to the present are void, and the Court can make no order. The Master clearly had no jurisdiction to deal with this application, because it was not in respect of a matter for which jurisdiction has been conferred upon anyone else than a Supreme Court Judge. We find that jurisdiction in such matters was conferred upon the Chief Justice by the Local Court Act.

HENSMAN, J. I am of the same opinion. There is, in the Local Court Act, a special power given to the Chief Justice, which means any Judge in Chambers, to deal with these matters; this application not coming before a Judge in the first instance, the proceedings, in my opinion, are void.

Appeal allowed.

Appellant in person.

Solicitors for respondent: *Moorhead, Northmore & Lukin.*

1901.

June 18.

The C. J. *Hensman*, J.

DARLING, PLAINTIFF (RESPONDENT).

GASCARD, DEFENDANT (APPELLANT).

Fraud of both parties—Relief in Equity—Colorable transaction.

One Mrs. M. was the owner of certain land which was mortgaged to S. for £1,000. An agreement was entered into between G. and Mrs. M. which after reciting a Deed of Assignment of even date of the land to G. for £2,000, provided that Mrs. M. should have the right to re-purchase the land for £2,100, G. agreeing to re-assign upon payment of that amount. It was further provided that G. should pay Mrs. M. £30 per month out of the rents of the land, and should hold the balance upon a special account, and upon the re-purchase by Mrs. M. should account for the same as part payment of the said sum of £2,100, less any money spent by G. in improvements, if such were sanctioned by Mrs. M. The value of the property falling, G. desired to free himself from this charge, and arranged with S. to sell the land under his mortgage, and also with the plaintiff to buy the land as agent for G. The whole of this transaction was intended by the parties to it to be colorable merely, and to have no binding effect between them; its purpose being to apparently divest G. of ownership, in order to defeat Mrs. M. The land was put up for sale by public auction and was purchased by the plaintiff for £2,250 and the latter gave S. a mortgage for £1,000 and G. a second mortgage for £1,100. The transfer was registered in the plaintiff's name, but no declaration of trust was executed by him in favor of G. The plaintiff, also at the request of G., made certain payments in respect of the land. On G.'s decease the defendant (his administrator) gave notice that he would sell the land under the second mortgage unless the principal money and interest thereby secured were paid. The plaintiff thereupon claimed in an action against the defendant that the second mortgage should be delivered up to be cancelled, and that an injunction should be granted to restrain the defendant from taking any proceedings under it and submitted to account to the defendant for the rents and profits of the land, and to transfer it to him. In the alternative he claimed the moneys he had paid for G. The defendant also counter-claimed for the amount, with interest, expressed to be due on the second mortgage. At the trial the Chief Justice gave judgment for the plaintiff and ordered the mortgage to be delivered up to be cancelled, and declared the plaintiff trustee for the defendant, and ordered the

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plaintiff to transfer the property to the defendant. The Judge also ordered that an account should be taken of the moneys received and paid in respect of the property during the time the plaintiff had a lien on it, and entered judgment for the plaintiff for the amount that should be found to be due to him on the account, and dismissed the counter-claim. The defendant appealed from this judgment.

On Appeal.

Held, That the arrangement by which S. sold the land under his mortgage, and the plaintiff bought it as agent for G., was not a *bonâ fide* sale, but a mere sham carried out in order to deceive Mrs. M. and deprive her of the benefit of her agreement with G., and that consequently a Court of Equity would not assist either of the parties out of a difficulty which had arisen by reason of the fraud of both of them, and that the claim and counter-claim should be dismissed, each party paying his own costs.

Parker, K.C. (*Lavan* with him), for appellant. The plaintiff is estopped by this mortgage from denying that he is the owner of the land, and consequently is estopped from denying that Gascard lent him £1,120. There is an absolute estoppel by deed. *Carpenter* v. *Buller* (*a*), *Wiles* v. *Woodward* (*b*). The plaintiff was not entitled to a verdict in this case, because, in order to gain the relief he seeks he must deny his own deed, and the solemn statement made therein. He cannot come into a Court of Equity asking for relief unless he comes with clean hands. Fraud was committed by both parties, and the plaintiff cannot ask for relief under the circumstances. *Roberts* v. *Roberts* (*c*), *Doe* v. *Roberts* (*d*), *Fry* v. *Lane* (*e*).

Pilkington, for respondent. In *Roberts* v. *Roberts* the plaintiff came into Court and pleaded his own fraud. Here the plaintiff has pleaded no fraud, but the defendant says that he can disclose a fraud which he perpetrated with the plaintiff. It is the defendant who is relying upon his own fraud. A person in Gascard's position purchasing from the first mortgagee in his own name purchased free from any agreement between himself and the mortgagor, *Shaw* v. *Bunney* (*f*), *Kennedy* v. *De Trafford* (*g*), *King* v. *Henderson* (*h*).

THE CHIEF JUSTICE. In this case before giving a decision the Court desires to hear further argument upon a point which has occurred to the Judges in their consideration of this case, to which the attention of counsel was not directed during the course of the argument. It is this. Assuming that both parties were guilty of fraud, could either of them claim the assistance of the Court? In this case both parties claimed relief; and assuming that both of

(*a*) 8 B & W. 209.
(*b*) 5 Ex., 557.
(*c*) 15 W.R., 117.
(*d*) 20 Rev. Rep., 477.
(*e*) 40 Ch. Div., 312.
(*f*) 2 De G. J. & S., 468.
(*g*) 1897 App. Cas., 180.
(*h*) 1898 App. Cas. 731.

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them were parties to a fraud, the question arises as to whether, under these circumstances, they can claim the assistance of the Court. One party claims relief on the equitable side of the Court, and the other claims it at Common Law. The Court would suggest that further argument should take place at the end of the Sittings. Of course, if the parties do not desire to argue further, we are prepared to give our judgment.

Further argument having been heard on the point referred to by the Chief Justice, the Court delivered judgment as follows:—

HENSMAN, J. The plaintiff in this case is a merchant at Geraldton, and the defendant is the administrator of the estate of Jules Gascard, deceased, late of the same place. In his Statement of Claim the plaintiff alleges that he became the purchaser of certain land at Geraldton at a sale by auction; that he bought at the request and as the agent of Gascard, and that he executed a first mortgage of the land to one Patrick Stone, and a second mortgage to Gascard. He says that he made certain payments in respect of the land, at the request of Gascard, and that all his dealings were solely as agent and trustee for Gascard and not for his own benefit. He alleges that the defendant as administrator of Gascard has given notice of his intention to sell the land under the second mortgage unless the principal money and interest thereby secured are paid. He submits to account to defendant for the rents and profits of the land and to transfer it to the defendant. He claims that the said second mortgage be delivered up to be cancelled, and that an injunction be granted to restrain the defendant from taking any proceedings under it. In the alternative he claims the moneys he has paid for Gascard as aforesaid. The defendant denies that the plaintiff bought the land as agent or trustee for Gascard, and that he made payments at Gascard's request. He says that the plaintiff held himself out as owner of the land and estopped from denying that he is owner. He counter-claims for the amount with interest, expressed to be due on the said second mortgage. At the trial before the Chief Justice the learned Judge gave judgment for the plaintiff, ordering the mortgage to be delivered up to be cancelled, and that the plaintiff should be declared a trustee for Gascard, and should transfer the property to his administrator. He further ordered that an account should be taken of the moneys received and paid in respect of the property during

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the time the plaintiff was acting as trustee, and he declared that the plaintiff had a lien on the land for the amount found to be due to him on the account. The counterclaim was dismissed. This is an appeal by the defendant from that judgment. The facts of the case as they appeared at trial are shortly as follows :—In September, 1897, a Mrs. Miller of Geraldton was the owner of the land in question, which was mortgaged to Stone to secure the sum of £1,000. On the 28th of that month an agreement was entered into between Mrs. Miller and Gascard, which, after reciting a Deed of Assignment of the same date of the land to Gascard, for the consideration of £2,000, went on to agree that Mrs. Miller should have the right to re-purchase the premises for the sum of £2,100, Gascard agreeing to re-assign upon payment of that amount. It was further agreed that Gascard, out of the rents received by him, should pay the rates and taxes, and should also pay Mrs. Miller, on the 1st of every month, the sum of £30. After payment of the above sum the balance received by Gascard was to be held by him upon a special account, and upon the re-purchase by Mrs. Miller was to be accounted as part payment of the said sum of £2,100. Upon such re-purchase Mrs. Miller was to repay to Gascard any money spent by him in improvements, provided that such expenditure had been previously sanctioned by her. At first it appears that the rents and profits of the land were sufficient to permit of the arrangement to pay Mrs. Miller £30 a month being carried out. But soon the value fell and Gascard desired to free himself from the burden of this charge. It was advised by his solicitor (Mr. DuBoulay) that if Stone sold under his mortgage he, Gascard, would be relieved. At the trial Mr. DuBoulay gave evidence to this effect, he said "Stone, Darling, Gascard, and myself arranged for the sale; Stone's mortgage was to be continued at the present rate. The price was fixed at £2,250, made up of £1,085 due to him, and the balance what Gascard claimed as owing to him by the land. It was arranged that if no person bid up to that amount Darling should bid for it. Darling and Gascard were parties to that arrangement. Darling was to bid as agent for Gascard. Gascard was not to bid because if he got the land in his own name he would be liable under the agreement." That is the agreement with Mrs. Miller whereby he had to pay £30 a month to her. The witness continued as follows, "I was present at the sale. Darling purchased and gave a cheque for £450 to the auctioneer. The

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auctioneer handed it back to me and it was destroyed. It was never presented for payment. On October 24th, 1898, the various documents were completed. Darling, Gascard, Stone and myself were present. The mortgage produced was then signed in their presence (this is the deed which the plaintiff claims to have cancelled.) The mortgage is for £1,178. I cannot tell you how it is made up. It was made up at Gascard's dictation. He and Darling made it up together. It was never suggested that the £1,178 was due from Darling to Gascard." In cross-examination the witness said, "Had a stranger purchased I think Gascard would have got out of his liability. I considered that practically the property was bought by Gascard although his name did not appear; he was to cease to be owner." This is the evidence of the solicitor who was acting at the time for both parties. I have given his evidence fully in order that the reason upon which my judgment is based may be clearly known. The learned Judge found as a fact that the arrangement between the parties was to the effect deposed to by the solicitor, and I do not wish to differ from that view. The question to be decided is whether this Court should assist the parties, or either of them, to avoid the consequences of their efforts to deprive Mrs. Miller of whatever rights she had under the agreement. That agreement was to pay out of the rents and profit the rates and taxes, and also to pay to Mrs. Miller £30 a month. Assuming for the sake of argument that the monthly payment was only to be made out of the rents, and that at the time of the so-called sale there were no rents, nevertheless the rents might again rise in value and the liability would still remain. The parties were advised and believed that a sale to a stranger, by Stone, was necessary in order to get rid of the liability of Gascard to Mrs. Miller. They concocted a scheme whereby that which was not a sale at all, but a mere sham, should appear to be a sale in order to deceive Mrs. Miller, who was not then in the country, and to deprive her of the benefit of her agreement with Gascard. It was suggested at the trial that Gascard had been in some manner entrapped into that agreement. If that were so he had his remedy. He could have applied to the Court to set it aside. But there is no principle of either law or equity which will sanction the commission of a fraud in order to defeat another fraud. In reading the evidence given at the trial there is much which is confused and unsatisfactory, but one fact is quite clear, that these parties are seeking the aid of

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a Court of Equity to assist them out of the difficulties in which they have been placed by their own crooked proceedings. In my remarks I have referred of course to Jules Gascard and not to the defendant, who only appears in his representative character, and who took no part in the proceedings. I am of opinion that this Court ought not to give its aid to either of these parties, but that both claim and counterclaim should be dismissed, and that each party should pay his own costs.

STONE, C.J. I am of the same opinion. I only wish to add that the appeal is one from a decision of mine, given in the Court below, and I think that it might be collected from the facts and circumstances which were found by me that there was fraud. There was an attempt to impose upon and deceive Mrs. Miller, who was not a party to the fraudulent agreement entered into between the parties. This being so the Court will not assist either, both being equally guilty. It is true that the defendant may gain some advantage, but it is not our intention to favor him more than the plaintiff, but simply to act upon the principle of public policy that where parties are concerned in a transaction, such as the one referred to, they cannot go and ask the Court to relieve them of a difficulty they find themselves in in consequence of their attempt to deceive and impose upon a third person, in this case that is Mrs. Miller.

Claim and Counter-claim dismissed.

Solicitor for appellant : *M. G. Lavan.*

Solicitors for respondent : *Stone & Burt.*

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June 26.

The C. J.
Hensman, J.

Goldfields Act, 1895, *Quartz Claims—Gold-mining Lease—Special Case—Lodging Objections—Jurisdiction of Warden—Certiorari.*

W. pegged out certain quartz claims in the mining district of Mount Magnet, and on 26th October, 1899, made application to register them. Certain objections were lodged by A. and others, who claimed to be holders of a gold-mining lease of the land the subject of the application for quartz claims. There were three objections, viz. :—(1) That W. had not marked out the quartz claims on the 26th of October. (2) That the quartz claims comprised portion of the area of the gold-mining lease of which the objectors were the registered proprietors. (3) That the lease, in the name of the objectors, had been gazetted on the 8th September, 1899. The case came on for hearing before Warden D., the then Warden of the district. After certain evidence had been given by the

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objectors (claimants) the applicant desired to call evidence to shew that a preliminary to the application for the lease had not been complied with, viz., that the ground had not been marked out in accordance with the Regulations. Evidence was given upon that point, and no application was made by the solicitor, on behalf of the objectors, to be allowed to call evidence in reply. At the conclusion of the case a special case was stated under Section 62 of the Goldfields Act, 1895, for the opinion of a Judge of the Supreme Court. The questions asked in the special case, and the answers of the learned Judge thereto, were as follows:—

1. Should the proceedings before the Warden have been instituted by plaint and summons?

Answer. No:

2. Has the Governor any power to give a conditional approval of an application for a gold-mining lease subject to survey?

Answer. Yes.

3. Is a conditional approval tantamount to the issue of a lease?

Answer. Yes, for some purposes, as an approval may be subject to certain conditions.

4. Is the gold-mining lease issued to A. valid against W.'s application for quartz claims upon the evidence adduced before the Warden?

Answer. No.

On the return of the special case Warden D. had left the district, and Warden H. had taken his place. W. applied to Warden H. to have the opinion of the Judge entered up. Warden H. refused on the ground that as he had not heard the evidence in the former case he could not do so, and decided to hear the case *de novo*. On the case coming on for re-hearing, the claimant raised a new objection. He did not lodge that objection as provided by Regulation III. (Regulations of May 1st, 1896), but merely sent a letter to W.'s solicitors, stating that he would take that objection. The Warden heard the case and refused the registration of the quartz claims and ordered the applicant to pay the objector's costs. Welsh thereupon obtained a Writ of *Certiorari*.

Held, that the Writ must be quashed.

On the return of the Rule.

Forster, in support of the rule. The application is to set aside by *certiorari* an order of the Warden's Court at Mount Magnet. The rule *nisi* was dated 11th June, 1901, and made returnable on the first day of the March Sittings. One of the grounds of our motion to quash the Order now before the Court is that the matter is *res judicata*. By Sections 51 and 52 of the Goldfields Act, 1895, the jurisdiction of a Warden is defined, but there are cases to shew that it was never contemplated by the Goldfields Act that a Warden should be empowered to re-open a case after a decision by a Judge *The Queen* v. *Cope* (*a*), *Ex parte Sea Queen Quartz Company* (*b*), *The Queen* v. *Strutt* (*c*), *In re May* (*d*). The matter was *res judicata*, *Lindley* v. *Hansen* (*e*). The Order we complain of does not shew any

(*a*) 4 Aus. Jur., 113.
(*b*) 5 A.J.R., 77.
(*c*) 3 V.L.R., 186.
(*d*) 28 Ch. Div., 517.
(*e*) 15 N.S.W. Weekly Notes.

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jurisdiction, and was drawn up at a subsequent date to the hearing. Unless an Order is in the form of one of the Schedules to the Act it must shew jurisdiction. Also the Order does not state the amount of costs. The amount of costs must be fixed at the time the Order is made. *Selwood* v. *Mount & Another* (*a*), *The Queen* v. *Rogers* (*b*). No notice from the Court was given as to the second hearing except by a solicitor's letter. The only notice we received was by a letter from James and Darbyshire (solicitors), stating that they intended to call further evidence as to forcible possession and general evidence. *Osborne* v. *Gaunt* (*c*). The main question is whether the Warden had a right to hear further evidence. Clearly the whole tenor of Section 62 is that the whole case shall be settled by a Judge of the Supreme Court. In his reply to the special case Mr. Justice Hensman held that this was a proceeding within Section 62, but not within Section 53.

Leake, K.C., (for the objectors). I do not propose to go over the whole ground of argument, but to direct my attention to what is really the basis of this application. My friend has altogether mistaken his remedy. He has issued out a Writ of *Certiorari*. That Writ of *Certiorari* is rather in the nature of a Prohibition, because he was really testing the question of jurisdiction. I submit, (1) That there is no doubt that the Warden had jurisdiction to determine the question. And (2) That he had power to make the Order. There may be a question as to whether his Order may be made in one or another particular form, but that he had power to make the Order cannot be doubted. As to procedure, the proceedings were first before Warden Dowley, who, during the course of the proceedings, noted a law point which was afterwards embodied in the special case stated by him under Section 62. In the Warden's Court Welsh was in the position of a plaintiff. Warden Dowley being transferred to Coolgardie, had no jurisdiction, and the case came before Warden Hicks, who heard the case again, but the same facts were not before him as were before Warden Dowley. I submit that having re-heard the case the Order made by Warden Hicks is good, and that he acted within his jurisdiction. *Regina* v. *Jeffries* (*d*). Further there is no appeal under Section 62 from the opinion of the Judge, and as soon as it becomes the Order of the Warden we can appeal, and

(*a*) 1 Q.B., 726
(*b*) 5 W.W. & A.B., 206.
(*c*) 3 Aus. Jur., 47.
(*d*) 22 L.T., 786.

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certiorari does not lie. The Warden's Order is supposed to follow the opinion of the Judge, but that opinion does not become a ruling until adopted by the Warden. The remedy in this case was by way of appeal, but instead of that they have applied for a Writ of *Certiorari* which attacks the jurisdiction.

Pilkington (for Warden Hicks). Distinguished *ex parte Sea Queen Quartz Company*. *Smith* v. *Harrison* (*a*), is in point as to the re-opening of the case. In *Summers* v. *Cooper* (*b*), even where the plaintiff had not given sufficient evidence to prove his case, further evidence was allowed to be taken. At the trial we produced our lease, although we did not prove we pegged properly. When the case came before Mr. Justice Hensman there was no evidence that the lease had been granted prior to the pegging out by Welsh. Prior to that the lease was open to anyone owning a Miner's Right. Since then we have proved that our lease had been granted. When this case came before Mr. Justice Hensman it had not been proved that the lease was completed. There had only been a conditional approval—we have proved since that there was an absolute approval although the approval was subject to survey. *Clarke* v. *Wrigley* (*c*). As to further evidence see *United Claims Tribute Company* v. *Taylor* (*d*). The section does not insist upon the Warden entering a judgment the moment he gets the answers from the Judge: he merely gets those opinions upon points of law. The point of law in the special case was whether Welsh was entitled to impeach the validity of the lease by shewing that the application for that lease was surrounded by some informalities. Can such a lease be invalidated by such evidence? Although the case goes to the Supreme Court, the Warden's Order is the order *per se*. Even after the special case the Warden is still in a judicial position. If there is any question, it is whether the section contemplates a judicial power remaining in the Warden after an opinion has been given by the Court. If that is contemplated under one set of circumstances, it must be contemplated in all. *Budd* v. *Davidson* (*e*), shews that so long as a person has judicial functions he has authority to hear further evidence if he thinks fit. The question is whether the Warden had jurisdiction. Further, with regard to another objection, there is

(*a*) 41 L.J.P.C., 34.
(*b*) 5 V.L.R., M.C. 22, 42.
(*c*) 4 W.W., A.B., 74.
(*d*) 8 V.L.R., M.C., 19.
(*e*) 22 Weekly Reporter, 122.

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nothing to prevent a special case being stated during the hearing of a case. In *Norton* v. *London & North Western Railway* it was held that there was nothing to prevent a party giving notice of appeal as often as he pleased. Section 51 of the Goldfields Act gives a Warden power all over the State. If the Warden was acting judicially he was entitled to receive further evidence. Every case that has been decided upon the point in the Eastern States has been in my favor. As to Welsh receiving no notice, it is admitted that he received the letters. Further, he was present, and, therefore, must be taken to have waived any objection on that point. The Warden found against Welsh as to the forcible possession taken by him. The Warden found that Welsh took forcible possession, and that Regulation 119 alone deprives him of all interest in the land. Therefore, if the Court were to quash this Order, it would be a fruitless proceeding. Anderson has his lease which is good against the world, except as against the holder of a Miner's Right pegging out whilst the lease is in abeyance. *Osborne* v. *Morgan* (*a*). Regulation 25 has not been complied with by Welsh, as he has not pegged out his quartz claim from a base line as provided by the Act. This case should have been by way of appeal. Where a case is fitter for appeal, *certiorari* should not issue. *The King* v. *Whitbred, ex parte Wake* (*b*).

Moorhead, K.C. (in support of the Rule) in reply. The title to a quartz claim is good if the pegger held a Miner's Right. The Warden was compelled to adjudicate in accordance with the opinion of the Judge. *Regina* v. *Struve* (*c*). The ordinary practice under the Common Law should obtain under the Regulation. As to forcible possession, this occurred subsequent to the opinion of Mr. Justice Hensman, which I contend gave him the grounds he had pegged out and applied for. Further, no Regulation can forfeit an interest acquired in a claim. The Regulation is *ultra vires*. We say that the Warden has performed a judicial act when he was only empowered to perform a ministerial one.

STONE, C.J. This was an application upon the return of a Writ of *Certiorari* to quash the order of the Warden's Court at Mount Magnet upon the ground, amongst others, that neither the said Court nor Arthur Hicks who was then Warden had jurisdiction to make the order, and that the order is bad upon its face, and that

(*a*) 13 App. Cas., 227. (*b*) 11 Q.B.D., 296.
(*c*) 59 J.P., 584.

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the Warden entertained and made his order upon other than those objections made by the applicant for the quartz claims. It appears that an application was made under Regulation 111 of The Goldfields Act, 1895, for registration of certain quartz claims. That Regulation provides, amongst other things, that should anyobjection be lodged within the time specified the Warden shall defer registration until the matter has been heard and determined by evidence submitted to him, or by the order of the Warden's Court. Certain objections were lodged by Anderson and others, the alleged holders of a lease of the land the subject of the application for quartz claims. There were three objections, one, that William Welsh, the applicant for the quartz claim, had not marked out the said quartz claim on the 26th October, or at all ; secondly, that the said quartz claim comprised portions of the area included in the Gold Mining Lease of which the objectors were the registered proprietors ; and thirdly, that the lease in the name of the objectors had been duly gazetted on the 8th of September, 1899. Under Regulation 156 it is provided that when any objection has been lodged with the Mining Registrar the Registrar shall forthwith report to the Warden such objection, and the Warden shall thereupon fix a day for the hearing of the objection in Open Court ; and if the objector shall fail to prosecute his objection, or if the Warden shall dismiss it, the Registrar, upon the receipt of a notice from the Warden, shall register such title in the manner provided by the Regulations, and if the objection be up-held, the Registrar shall act in accordance with the order of the Warden. Now after these objections were lodged, the case came on for hearing before the the then Warden, Mr. Dowley. Although it was for the objector to support his objection, it appears, from the proceedings returned, that the claimant to be registered commenced the proceedings. He gave certain evidence after having first of all raised two or three preliminary objections to the jurisdiction of the Warden. These objections were apparently over-ruled and the case proceeded. The objectors were represented by counsel, the applicant appearing in person. After certain evidence had been given by the claimant the witnesses were cross-examined by counsel for the objectors, and the lease held by the objectors was put in in evidence. The applicant thereupon desired to call evidence to shew that the preliminaries had not been complied with ; that is, that the ground had not been marked out in accordance with the Regulations.

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Evidence was heard upon that point and the witnesses were cross-examined, but no attempt seems to have been made in the course of the cross-examination to question their evidence with regard to the marking out of the land applied for as a lease. No application was made by the solicitor on behalf of the objectors to be allowed to call evidence in reply. Unquestionably had he applied he would have been entitled to call such evidence. Judging by the report sent down from the Warden the case seems to have been concluded. It is true that the counsel or solicitor who appeared has made an affidavit that the case was not concluded, and that it is incorrect to state that he had concluded his case, or that he ever intended to conclude his case; but I notice an omission from his affidavit, in this, that he does not go so far as to say that he had any witnesses present who were prepared to give evidence in reply to the evidence given by the claimant's witnesses. Therefore, I must say from the facts before me, I have no doubt that the case was concluded, and the solicitor, whether advised or not, was content to rest his case upon the evidence that had been given up to that time before the Warden. At the conclusion of the claimant's evidence he asked the Warden to state a case under the provision of Section 62 of the Goldfields Act, and thereupon the Warden stated a case that included the preliminary questions raised with regard to his jurisdiction, and also a question as to whether, upon the evidence given, the lease was a valid one. That special case came on to be heard before my brother Hensman, who gave his opinion upon the points raised; he being of opinion, amongst other things, that upon the evidence adduced before the Warden the lease was not a valid one. Now before that opinion was returned to Warden Dowley he had ceased to be the Warden of that particular district, and Mr. Hicks had taken up that position. On the return of the opinion an application was made by the claimant to have that opinion recorded by the Warden in accordance with the requirements of Section 62; but the Warden took exception to this upon the ground that as he had not heard the evidence he was not in a position to give a decision until he had re-heard the case. Before I go further with the facts I will deal with that objection of the Warden, because it is contended that the Warden ought not to have refused to record that opinion: that he had merely to perform a ministerial act under Section 62, and that whether he was the Warden who heard the case or not was immaterial. It is provided by Section 62 that in any proceeding of

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the Warden's Court it shall be lawful for the Warden to reserve any question in the form of a special case for the opinion of a Judge of the Supreme Court, and I desire to say, as the point was raised with regard to that provision, that I entirely agree with the opinion expressed by my brother Hensman in reply to some observations which fell from Mr. Pilkington on behalf of the objectors. I think that under this section it is quite open to the Warden, and it is quite open to any parties appearing before him, to reserve any question before the case is concluded. I am aware that by a certain decision in the Victorian Courts it was decided otherwise, but with all due respect to the Judges who decided that case, I am of opinion that there is nothing in this section which makes it imperative upon the parties to conclude their case before asking for a case to be stated for the opinion of a Judge of the Supreme Court. Indeed, I think it is very desirable that this should be so, because many preliminary points may be raised, the decision of which may prevent the parties from going to a great expense in subsequently calling witnesses in connection with the question that has arisen for the Warden's decision. For instance, with regard to the reception of evidence, a preliminary point may occur, which, if that evidence be receivable, may put an end to the whole case. Therefore, why should not the parties be entitled to raise that point during the hearing, and thus save the expense of going on with the case and calling additional evidence. Apart from this other matters may incidentally arise in the course of the hearing upon which it is desirable that the Warden should have the opinion of a Judge before giving his decision, in order that the parties may be saved expense. In this case I am of opinion that when the Warden was asked to state a case, the whole case between the applicant and the objectors had been concluded. Now the duty of the Warden under such circumstances is to make his order in accordance with the opinion which has been sent him, and I am of opinion that the compliance with that direction is not merely a ministerial, but is a judicial act, because the opinion given by the Judge may not be such an opinion as will decide the whole case before the Warden. It may be necessary for the Warden to bring his mind to bear upon the evidence that has been adduced before him, and to mould his decision in accordance with that opinion ; but in any case it is necessary for him, after having received the opinion, not merely to register the opinion, but to give his decision. For instance, in this particular

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case one of the objections was that the claimant had not complied with the regulations when pegging out his claims. Now, if the Warden had simply barely recorded the opinion of the Judge, which was to the effect that the lease was void, that would not have determined the case. The Warden must give his decision upon, and be guided by, the opinion of the Judge, but he would first of all have to bring his mind to bear upon the evidence which had been given in respect of the first objection, that is, the objection to the pegging out of the quartz claim. This, I think, shews that the duty of a Warden under such circumstances is something more than merely ministerial ; he has to bring his mind to bear upon, and give his decision upon, the whole case, he being of course bound in giving that decision by the opinion of the Judge so far as it bears on the question before him. Now in this case, unfortunately, between the date of the opinion being received by the Warden and the decision of the Warden, the Wardens had changed office, and I take it we must look at this case as if Warden Dowley was non-existent, just as one would have to decide in the case of a Magistrate dying after having partly heard a case, and who had stated a case for the opinion of the Court before the new Magistrate was appointed. I think under the circumstances it was not open to the new Warden, Mr. Hicks, to deal with the case. He certainly could not bring his mind to bear upon the evidence, because he had not heard it. All he could have done would have been to register the bare opinion of the Judge as disclosed in his answers to the special case, and, as I say that opinion would not have been a judgment because under Regulation 156 the Warden has to decide whether he supports the objections lodged or whether he dismisses them. And he not only has to decide that question, but he also has to decide the very important question of costs, which again shews that the Warden has something more than a ministerial duty to perform, and that he has to bring his mind to bear upon the proceedings before him and decide the question of costs. Another objection, however, has been raised on the previous case, and of which notice had not been given in accordance with Regulation 156. This involves the very important question as to whether the Warden did not exceed his jurisdiction. I may say that I am of opinion that under the circumstances of this particular case, that Warden Hicks had power to re-hear the case, and could not give any decision or deal with the opinion of the learned Judge without

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re-hearing the case, but I am further of opinion that having decided to re-hear the case the Warden was bound to proceed in accordance with the provisions of Regulation 156 when dealing with the fresh objection then raised, namely, the objection under Regulation 119 as to forcibly taking possession of the land, the subject of the dispute. As that new objection had been taken it was encumbent upon the parties, before the hearing, to have lodged that objection with the Mining Registrar, and for the Mining Registrar to have reported such objection to the Warden, and the Warden thereupon to fix a day for the hearing. In this case, however, there is nothing before us to shew that the objection was lodged or that the Warden fixed a day for hearing as provided by this Regulation. It appears that the applicant applied to Warden Hicks to give a decision in accordance with the opinion forwarded with the special case, and that the Warden objected to do so on the grounds to which I have referred. After that the solicitor for the objectors gave the applicant notice that the case was listed for a certain day, and that they intended to bring forward fresh evidence, and that they also intended to raise the objection that forcible possession had been taken of the premises. The applicant appears to have applied for an adjournment, and I think an adjournment was granted for a day. He then appeared, but apparently only for the purpose of again renewing his application to the new Warden to register the opinion of the Judge, and when he found that counsel for the objectors were then appearing before the Warden and that the Warden decided to proceed to hear the further objection and further evidence, he left the Court. It would also appear by the affidavits that the Warden suggested to counsel that they should adjourn for a couple of days in order that the applicant might have an opportunity of appearing with his evidence and proceed with the case *de novo*. Upon this it appears that one of the counsel objected and expressed his willingness to accept the risk of proceeding. Upon that the Warden proceeded to re-hear the case, and gave a decision adverse to the applicant, and it is from the order made upon that decision that the applicant now moves this Court upon the return of the *certiorari*. I am of opinion that the Warden exceeded his jurisdiction in dealing with the case in the way he did; and that it is necessary in the interests of justice that there should be a re-hearing before him, when the proceeding should be conducted in accordance with the provision of Regulation 156. With regard to the point taken

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that the order was bad upon its face, I do not think there is anything in that, because I do not think that this Court should be too astute in dealing with the form of an order, so long as that order is in substantial compliance with the intention of the Act. We must take it until the contrary is proved that everything has been done rightly, and as this order appears to have been made in the matter in dispute, we must take it that the order was made upon a hearing of the matter before the Warden. I do not think I need deal with the other objection, being of opinion that the new Warden could not register the decision, but that he committed an excess of jurisdiction in hearing the subsequent application which included an objection that had not been taken before his predecessor.

HENSMAN, J. I am of the same opinion, and after the way in which the Chief Justice has treated the case I shall be able to deal shortly with the matter. Objections were lodged with regard to the claimant's application for certain quartz claims. These objections, although three in number, were really two in substance: first, that Welsh did not mark out the quartz claims on a certain day, or at all; and secondly, that they formed part of a mining lease of which the objectors were the proprietors. Section 62 of the Act allows a Warden to reserve any question he thinks fit for the opinion of a Judge of the Supreme Court, which opinion, when given, shall be drawn up and transmitted to the Warden, who shall make his order in accordance with such opinion. In the present case, after the opinion had been given and forwarded, further evidence was taken—and taken for what I think was a good reason, namely, because the Warden who heard the case had been removed to another district. I agree with the Chief Justice in the main, that a question may be raised for the opinion of the Judge during the hearing of the case. Such a proceeding may expedite the final decision, and may be generally in the interests of justice, because upon the decision of that question the case may be either settled, or the evidence may be curtailed and time be saved. I am, however, of opinion that if a case is stated for the opinion of the Judge, after the evidence is closed, then no further evidence can be given, it being contrary to the rule, which is, that a party must make up his mind what he will do; and he must not, after the opinion of the Judge or jury has been taken, bring forward further evidence which he has kept back. In the present case, looking at the evidence and

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considering the way the cross-examination was conducted by the objector's solicitor, I have come to the conclusion that the case was closed. The opening evidence was to shew that the claimant had pegged out his claim, and the cross-examination was directed to two points: first, that as the pegging had been done by Little, for Welsh, it was an improper pegging as it was done by an agent. And secondly, that these claims were within the area of a lease alleged to belong to the objectors. On the other side the solicitor for the objectors put in the lease and rested upon that, upon which evidence in reply was given by the claimant to shew that the lease was not a good lease because the preliminary conditions had not been fulfilled. That was the way in which the case proceeded in the first instance before Warden Dowley. A special case was stated upon which I gave an opinion which was sent back to the Warden, and if the same Warden had been there on the return he ought at once to have proceeded to give his decision in accordance with that opinion. The effect of that opinion on one point was that the lease was not good as against Welsh. I am not prepared to differ from the Chief Justice in his view that the Warden's decision would be a judicial act, because I agree with him that the Warden had to take into consideration other matters in connection with the case, and had not merely to record my opinion, but to exercise his judgment as to what should be done upon it. There, however, having been a change of Wardens, I do not think that the new Warden was wrong in deciding to hear the case *de novo*. Assuming he had that jurisdiction he must, in exercising that jurisdiction, follow the Act, because the moment he goes beyond the provisions of the Act he is guilty of an excess of jurisdiction. The Act says that when any objection shall have been lodged with the Registrar, the Registrar shall report to the Warden, who shall fix a day for the hearing thereof. Now the question here is whether a fresh objection was lodged. The objector wished to bring forward a new objection, and the way he did so was by merely writing a letter to the claimant saying that the case had been fixed for hearing and that he proposed to bring in additional general evidence. A letter also went to the solicitors for the claimant saying that the objectors intended to bring forward evidence of forcible possession and fresh general evidence. The question of forcible possession was a new and very important objection to bring forward, because by Regulation 119 any person who attempts to take possession by force

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forfeits all right, title and interest to the land in dispute. There was no notice of that objection in accordance with the Act, that is no objection was lodged with the Registrar in the form required by the Regulation. With regard to the question of forcible possession it was argued before us that the Regulation has no bearing because it is *ultra vires*. I propose to give no opinion upon that point at present. The Warden, however, refused to register the claim and upheld the objection. I think the Warden in doing that was acting beyond his jurisdiction. The Warden does not appear to me to have followed the judicial opinion given by the Judge of this Court, because one of the principal grounds upon which I decided was that this lease was not properly pegged out, there being only four pegs used to peg out a six-sided piece of land. Evidence was again given upon that point at the re-hearing, and it appears that the objectors admitted that although it was a six-sided block they had only put in four pegs. I refer to this particularly to shew how desirable it is that a case should not be sent to the Supreme Court until all the evidence is given, so that the opinion of the Judge may not be evaded. Here the objectors endeavoured to evade that opinion by shewing that there was no difference in the area of the six-sided lease and the four-sided lease as pegged out, although on the former hearing a difference of three acres was proved. It seems to me that the evidence which was afterwards given was brought for the purpose of nullifying a portion of the opinion given by me on the special case. For these reasons I am of opinion that the Warden, although he had a right to re-hear the case, did not re-hear it in the proper manner, and further that he did not upon the re-hearing follow the opinion of the Judge, which was still law upon the question before him. I think the moment he departed from the opinion of the Judge he acted outside his jurisdiction. On the whole case I am of opinion that this order must be quashed.

Order quashed.—Costs reserved.

Solicitor for appellant: *W. T. Forster.*

Solicitors for respondent: *James & Darbyshire.*

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June 28.

The C. J.
Hensman, J.
Pennefather, J.

HILL *v.* HILL.

Divorce—Husband's petition—Adultery—Delay in presenting petition—Want of means.

A petition for divorce, presented by H. against his wife, was heard before Stone J., who found that adultery had been committed, but not being satisfied with the petitioner's explanation of the length of time which had elapsed before presenting the petition, he refused a decree. The petitioner gave evidence of want of means, but counsel did not press this very strongly.

On Appeal.

Joseph, for petitioner, read an affidavit of the petitioner of want of means.

STONE, C.J. As I have now before me evidence which was not before me at the time I came to the decision upon the ground of undue delay in presenting the petition, and which satisfies me that there was something in the statement of the petitioner before me that he had no means, and he having gone into details in his affidavit as to how it was that he had not sufficient money to provide for the costs of instituting proceedings, I am of opinion that this case should be re-heard. I think if I had had these facts before me on the hearing, I should have hesitated in refusing this petition. At the same time I desire to point out that parties, in petitioning for divorce, must understand that it is not a matter simply between the petitioner and the respondent, and they must know that the Court has to safeguard the interests of society in dealing with these matters. The mere assertion of the petitioner before me that he had no means, did not commend itself to my mind, because it is so easy for anyone to make such an excuse; and, as I pointed out in the Court below, where there has been a very great delay, it would appear as if the parties had arranged between themselves to live apart, and the petitioner was not at all concerned as to whether his wife was living in adultery or not. It is, therefore, important that the Court, before granting a decree in such circumstances, should have full evidence as to the facts.

HENSMAN, J. The question whether there has been unreasonable delay in coming forward to petition for divorce is one within the discretion of the Judge who tries the case. That being so, and the learned Judge who tried this case having stated that if he had had the evidence now before the court before him at the trial, he would not have exercised his discretion in depriving the petitioner of his remedy, I do not feel inclined to differ.

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PENNEFATHER, J. I desire to express the opinion that, where counsel appeared for a petitioner in an undefended case, the counsel has no right to expect the Court to point out what evidence is required. I think it is the duty of counsel to give full testimony and explain the circumstances, especially in a case like this, where there has been great delay. But for the evidence we have heard to-day, I should hold with the Chief Justice that there was not sufficient evidence to justify him in granting a decree.

Case ordered to be re-heard.

Solicitor for petitioner : *H. B. Joseph.*

REX *v.* REID.

1901.

July 18.

The C. J.
Hensman, J.
Pennefather, J.

Criminal Law Amendment Act, 1892—55 *Vic.*, *No.* 24, *Sec.* 17—*Incest—Half-sister.*

The prisoner was convicted under Section 17 of the Criminal Law Amendment Act, 1892, of having carnally known his sister. It was proved at the trial that the prosecutrix was the prisoner's half-sister, and that she was illegitimate. The Judge at the trial, at the request of the prisoner's counsel, reserved the question under 50 Vic., No. 15, for the consideration of the Full Court, of whether, under the above circumstances, the prosecutrix was a "sister" of the prisoner within the meaning of the Act.

Held, that the word "sister" in Sec. 17 of the Act includes half-sister.

Beresford, for the accused. "Sister," within this section, does not cover half-sister, and more particularly a natural half-sister. *R.* v. *Whistler* (*a*)

The Crown Solicitor (*Burnside*) in support of the conviction. Section 19 of the Act says that it is "sufficient to prove that the woman or girl on whose person, or by whom the offence was alleged to have been committed, is reputed to be a daughter or other lineal descendant or sister . . . . . and it shall not be necessary to prove that such woman or girl . . . . . was born in lawful wedlock." As to the question of half-sister not coming within the meaning of this Act, see *Rex* v. *The Inhabitants of Hodnett* (*b*), *Grieves* v. *Rawley* (*c*).

Beresford, in reply. Section 19 does not create the offence, but only throws the onus of proof upon the prisoner.

THE CHIEF JUSTICE. In this case the Court is asked to give the definition of the word "sister" as used in the 17th Section

(*a*) Holt, 215. (*b*) 1 Term Rep., 96.
(*c*) 22 L.J. Ch., 625.

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of the Criminal Law Amendment Act. In this case the information was filed under that section, and it was proved on the part of the prosecution that the prosecutrix was only half-sister of the accused, and the question therefore arises whether the word "sister" in that section may be deemed to include half-sister. If the Court comes to the conclusion that it does so, it will give the word a more extended meaning, it seems to me, than the ordinary meaning given to it. At the same time if the Court is of opinion that it was the intention of the Legislature to include a half-sister as well as a sister of the whole blood, there is no objection to the ordinary meaning been extended to that degree, because the first thing the Court has to do, or endeavour to do, is to gather what was the intention of the Legislature in passing this particular section. The section is headed "Part II.—Incest." Incest we know is the criminal knowledge of any person within the Levitical degrees of kindred, and if we were dealing with this case under the ecclesiastical law, we should have no hesitation in coming to the conclusion that "sister" did include half-sister. It is a question for us whether the Legislature had in their minds the ecclesiastical offence, or the offence under the Levitical law, and in passing this enactment endeavoured to prohibit, by Statute, similiar offences to those prohibited under the ancient law. Under our law, by Sections 17 and 19, it appears to me that it was the intention of the Legislature to give an extended meaning to that word, and to include a sister of the half-blood. In other words the desire of the Legislature was apparently to prevent immorality of such a serious nature amongst families. No doubt in some of the dictionaries "sister" is defined to mean a daughter born of the same parents, but as my brother Hensman pointed out, there are distinctions also given which include daughters of the half-blood. Independently of these distinctions, however, I think the intention of the Legislature was to provide against such cases as these, and to try and prevent offences of so serious a character occurring amongst those who are so nearly related to one another.

HENSMAN J. I am of the same opinion. It has always seemed to me that it was by no means creditable to the English Legislature that they should not have made incest a crime. However, incest has been made a crime here within certain degrees of relationship. The object of the section is to endeavour to preserve the purity of family

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life, and to make it a crime for children, whether of full or of the half-blood, to have intercourse with one another. I am not quite prepared to take the same view as the Chief Justice, that we are extending the meaning of the word; because I think the word "sister" in its broad natural meaning includes a half-sister. In this State we have no precedents to quote from, but in the United States of America there are several authorities. I find in a well-known work on American law it is laid down that the crime of incest, in their Statutes, includes intercourse between sisters and brothers of the half-blood. I am of opinion that the conviction should be upheld.

PENNEFATHER, J. I concur.

Conviction upheld.

Solicitor for accused: *R. D. Beresford.*

Solicitor for the Crown: *R. B. Burnside.*

REX *v.* DAH RAM.

1901.

July 18.

The C. J.
Hensman, J.
Pennefather, J.

Criminal Law—Information—False pretences—False pretence of existing fact.

The prisoner was charged with false pretences. The material parts of the indictment were as follows:—"That the said Dah Ram did falsely pretend to one John Andrew that he would give the said John Andrew one single ten pound bank note in exchange for ten single one pound bank notes; by means of which said false pretences the said Dah Ram did then unlawfully obtain from the said John Andrew ten single one pound bank notes with intent to defraud, whereas, in truth and in fact, the said Dah Ram did not intend to give the said John Andrew one single ten pound note in exchange for ten single one pound bank notes, as the said Dah Ram well knew at the time when he did so falsely pretend as aforesaid, against the form of the Statute," etc. Before pleading, the prisoner's counsel moved to quash the indictment on the ground that it was bad in substance, and alleged no criminal offence, the alleged pretence being not of an existing fact, but of a statement by the prisoner that he would do something which he never intended to do. The point was reserved for the consideration of the Full Court and the trial proceeded, and the prisoner was found guilty.

Held (HENSMAN, J., dissentiente), that the indictment disclosed a criminal offence, as it alleged a false representation of an existing fact, and that the conviction must be upheld.

Abbott, for the prisoner. The information does not disclose a present intent. *Rex* v. *Moses Goodhall* (*a*).

The Crown Solicitor (*Burnside*), for the Crown, relied on *Regina* v. *Gordon* (*b*).

Abbott, in reply. In *Regina* v. *Gordon* the false pretence was that immediate payment would be made of certain moneys. *Regina* v. *Lee* (*c*).

(*a*) R. & R.'s Crown Cases, 461. (*b*) 23 Q.B.D., 354.
(*c*) 9 Cox's Criminal Cases, 304.

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STONE, C. J. The point raised in this case is an interesting one, because, but for the case of *Regina* v. *Gordon*, the question would be somewhat in doubt. That case, however, bears very strongly upon the one before us, inasmuch as the fourth count in the case cited, and which was dealt with by the Court, was very similar to the information in this case. The information here charges the accused with false pretences of a certain character. In *Regina* v. *Gordon* the fourth count contained an allegation that on a certain date, with intent to defraud, the prisoner falsely pretended that he was prepared to pay the prosecutors, or one of them, £100, with intent to defraud. Lord Justice Coleridge in the course of his summing up to the jury, said he had great doubt as to the validity of that count; but when the case came before the Court of Crown Cases Reserved, Lord Coleridge said he thought the true view of what was stated in that count was, that it was a statement by the prisoner to the effect that he was then and there prepared to give them £100 if they signed a certain document, whereas, in his opinion the prisoner never intended to give the £100. The objection to the count in that information was similar to the objection taken by Mr. Abbott to-day. He says that the words of the accused amounted merely to a promise at some future date to exchange ten one pound bank notes for a single ten pound bank note. Mr. Abbott's contention is that the words used by the accused were these, "I will give you a ten pound bank note in exchange for ten single one pound bank notes," and I think he used the same expression as that used by Lord Coleridge in the case of *Regina* v. *Gordon*. Now it is difficult to express in so many words the exact meaning that one would intend to convey upon being asked for change of a bank note, because the applicant simply says in so many words, "Will you change a bank note for me?" and the party applied to simply says "Yes." He does not say "Yes, I will now give you change," but it is clearly meant at the time between both parties that the applicant is there ready to give the money in exchange at once for the money he is applying for. There is no occasion, nor is it usual to express the time when that exchange will take place, and it seems to me that when the expression is used, as it is in this information, that the prisoner would give a single ten pound note in exchange for ten single bank notes, it means that he would give it immediately the party was ready to hand him ten one pound notes. In my opinion the

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accused intended to lead the prosecutor to believe that he was then and there ready to hand over the ten pound note in exchange for the smaller notes. That I think is the common-sense view of the false pretences stated in the information. Whether that was the intention or not is a question of evidence with which we have nothing to do, but I think the false representation of the existing fact was that the prisoner represented that he had there the single ten pound note ready to exchange for the ten single notes, but that he never intended to give the ten pound note. I am of opinion that there was a false representation of an existing fact, and that the information does disclose an offence. The conviction must be upheld.

HENSMAN, J. I am not prepared, as at present advised, to agree with the opinion which has just been given by the Chief Justice on this important point. The question to be decided is not whether the defendant intended to cheat the prosecutor or not, but whether the information disclosed a false pretence, within the meaning of the Statute, on its face. The law has always been that the false pretence must be a representation of an existing fact. It may be associated with a promise or expression of an intention to do something in the future, but the property must be obtained by reason of the false statement of the existing fact. In *Rex* v. *Goodhall* (*a*) the indictment alleged that the defendant did falsely pretend that if the prosecutor would sell him some meat he would pay for it on delivery and send the money by the prosecutor's servant. Whereas the defendant did not intend to pay or to send the money. The jury found that when he applied for the meat he did not intend to pay, but that he meant to cheat the prosecutor. The jury convicted the defendant, but the Judges held that there was no false pretence. There was merely a promise for future conduct. In *Regina* v. *Lee* (*b*) the money was obtained on the false statement that the defendant was going to pay his rent, but the Court of Criminal Appeal quashed the conviction. They held that it was not a false pretence of any existing fact, although the jury had found that the defendant had no intention of paying his rent. With regard to the case of *The Queen* v. *Gordon*, which appears to have influenced the Chief Justice to a considerable extent, it seems to me that that case is distinguishable from the present one. There,

(*a*) Supra. (*b*) Supra.

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the indictment charged the defendant with falsely pretending that "he was prepared to pay" the prosecutors £100, whereby he induced them to make a promissory note for £100, with intent to defraud. Lord Coleridge and Wills, J., held that the meaning of the statement was, "I am *now* prepared to give you £100 if you will sign this paper. Here is £100, and when you sign that paper, which you will do in a moment, the £100 is yours." They held, apart from all question of existing state of mind, there was a false pretence of an existing fact, namely, that the money was ready for the prosecutors on their signing the paper. Matthew, J., said that the phrase "was prepared" indicated an existing intention as distinguished from one that is prospective only. The other two Judges concurred without giving any reasons. I venture to think that the reason given by Mr. Justice Matthew is a dangerous one, and not consonant with the doctrines hitherto held by Judges on this question. I am of opinion that there is a clear distinction between the statement of the defendant in Gordon's case, "I am prepared to give you a hundred pounds," and the statement of the defendant in the present case "I will give you a ten pound note." The former may be construed to mean, the money is now here ready for you. The latter *primâ facie*, and naturally is only a promise for future conduct. This distinction may appear to be a fine one; but it is most important that the line should be clearly drawn between false pretences of existing facts, which are criminal, and those promises to pay in the future, which are constantly made by persons buying goods on credit, without the means or the intention of paying. For these reasons I am unable to agree that this information is good on its face, or that it discloses a false statement of an existing fact.

PENNEFATHER, J. In this case I think the decision is concluded by the decision in *Regina* v. *Gordon*. In that case the Court read into the information the word "now," and the reason for that was that they thought that that was the meaning in the minds of both parties at the time the occurrence took place. I think the false pretence alleged in this case is very similar to that alleged in the case I have just referred to, and to my mind it was in the mind of both Andrews and the defendant that he would at once hand over the single ten pound note. The question, however, arises, can these words be considered as meaning a present transaction between the

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parties on both sides? In this respect I can only agree with the remarks of the learned Chief Justice, and in my opinion the conviction should be upheld.

Conviction upheld.

Solicitor for accused: *A. F. Abbott.*

Solicitor for the Crown: *R. B. Burnside.*

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RETCHFORD, PLAINTIFF (APPELLANT).
ROBINSON, DEFENDANT (RESPONDENT).

1901
Sept. 18.

The C. J.
Hensman, J

Prize fight—Stake-holder—Illegal contract—Notice to return deposit—Payment over of stakes.

If a stake-holder holds money deposited with him in respect of an illegal contract at the time notice of revocation of the contract is served upon him, the applicant for the return of the money is entitled to its return both under the special law of the State of Western Australia and also under the authority of the cases decided in England. To defeat this right the stakes must have been actually and not constructively paid over to the winner.

The appellant and H. entered into a written agreement for a boxing contest at Collie, each depositing £25 in the hands of the respondent as stake-holder. The contest took place, and H. was declared winner by the referee. The appellant objected to the decision, and, through his solicitor some few hours later on the same day, and while the respondent was in possession of the money, served notice on him, calling upon him to return the deposit. It appeared from the evidence taken before the Local Court Magistrate that the respondent immediately after the fight had offered the stakes to H., the winner, but that the latter told him to keep the money until the morning. The appellant then sued for the return of the money from the respondent, and the Local Court Magistrate found for the respondent, giving as his reason that in the circumstances the offer of the stakes to H. was in fact a payment over of the stakes, and that after such offer the respondent held the money only as a bailee for H. The plaintiff appealed.

Held, that the Appeal should be allowed.

On Appeal.

E. A. Harney, for the appellant. Actual payment over of the money was required, because the reason why on the authorities the money could be recovered whilst still in the hands of the stake-holder is that, so long as the person depositing it upon a void contract was in a position to obtain it from a third person, he was entitled to do so. As to the right of a contestant to obtain back his stake even after the contest, *Diggle* v. *Higgs (a)*. The law in this State is very much stronger than the English law upon which this decision was given. Section 12 of the Police Act Amendment Act is identical with Section 18 of the English Act upon which the decision in Higg's case was given, and goes no further than to make null and void all wagers, the result being

(*a*) 37 L.T., 27, 2 Ex. Div., 422.

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that the ordinary doctrine in reference to void contracts becomes applicable, and that any money paid under it can be recovered back before the contract is executed. There are in the State Act two sections, Secs. 8 and 9, which nowhere appear in the English Act. The effect of these sections is to give an absolute right to the depositor to recover back his deposit at any time where the wager is in respect of an unlawful contract, but where the wager is in respect of a lawful contract, the Act does not apply.

Alcock, for respondent. This being a wager in respect of an illegal act the Court will not lend its assistance to either party.

STONE, C.J. This is an appeal from a judgment of the Magistrate of the Local Court at Collie. The plaintiff sought to recover an amount of £25 deposited with the defendant as a stake-holder in a boxing contest. The Magistrate was of opinion that the actual delivery was not essential and that the stake-holder, by binding the amount as he did to the winner, divested himself of his trust as stake-holder and subsequently held the money merely as an agent for the winner, and he gave judgment for the defendant with costs. It was contended by the plaintiff, before the Local Court, that under the Police Amendment Act, 1893, although all contracts by way of wagering are void, yet a party who demands the return of his deposit after the wager has been ascertained can recover such deposit. The defendant relied upon Section 9 of that Act, which provides that "nothing in the Act contained shall extend to any person receiving or holding any money or valuable thing by way of stakes or deposit to be paid to the winner of any lawful race or exercise, or to the owner of any horse engaged in any race." Some reference has been made in the course of the argument before us to Sections 7 and 8 of the Act, but, upon referring to these sections we notice that they apply, not to such a case as the one now before the Court, but to the case of owners or occupiers of houses kept for certain betting purposes. The section reads, "any person being the owner or occupier of any house, office, room or place" and so on. That is not the case here, and therefore when the 8th Section says that "any money or valuable thing received by such person as aforesaid as a deposit upon a bet shall be deemed to have been held to the use of the person from whom the same was received," the section is referring to persons keeping houses or rooms for the purposes of betting or such like. The 12th

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Section, however, enacts that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and no action or suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. There is an exception in favor of certain sums contributed to be awarded to the winner of "any lawful game." Now in this case the money was deposited with the defendant in respect not of a lawful game, but of an illegal act, that is, a boxing contest, or, as it is called in the course of the evidence, a fight. There was a fight going on, and that was an illegal act, and therefore the money was deposited in respect of an illegal transaction, so that the defendant cannot avail himself of that excepting proviso under Section 12, which excepts sums of money contributed to be awarded to the winner in the case of a lawful game. This being so, it appears to me that the deposit of £25 was in respect of an illegal transaction, and therefore recoverable so long as it had not been paid over to the person for whom it was intended. But even if we were not calling in aid the provisions of Section 12 of the Act, I still think the plaintiff would be entitled to recover, because the money was deposited (independently of the Act) in respect of, or for an illegal purpose, that is, for the purpose of being held and applied to the winner of an illegal sport. In the case of *Bone* v. *Ekless* (*a*), it was held that a person who has authorised the application of his money to an illegal purpose can recover it before it has been paid over or applied to such purpose as "*in pari delicto*." In this case the defendant had employed the plaintiff to sell a ship to a foreign government, and authorised him to apply part of the proceeds in bribing the officials. There both the plaintiff and defendant were parties to an illegal transaction, and yet defendant was allowed to recover in respect of a sum of money which it was proposed should be appropriated to that illegal purpose; and Baron Bramwell, in the course of his judgment, said that the law is in favor of undoing or defeating an illegal purpose, and is, therefore, in favor of the recovery of the money before the illegal purpose is fulfilled, and not afterwards. He says, "An authority to pay over money for an illegal purpose may be revoked before it is paid over."

(*a*) 29 L.J. Ex., 438.

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In *Johnson* v. *Lansley* (*a*) that proposition of law was laid down, although there the plaintiff had to prove as part of his case that he had entered into an illegal contract. He did not, however, seek to recover upon it. That makes the difference between *McKinnel* v. *Robinson* (*b*) and this case, because there the money was lent, not only for a purpose prohibited by the Statute, but was also certain to be employed for that purpose. And then Baron Martin says, "It is competent for a person who has paid money authorised for an illegal purpose to reclaim it." Here, as pointed out by Mr. Harney, the plaintiff is not seeking to have the benefit of this illegal transaction—a transaction that is void, and the contract concerning which he could not recover upon—but he is seeking to recover the money paid in respect of this illegal contract. In the case of *Diggle* v. *Higgs* it was held that a deposit with the stake-holder in respect of a walking match was void, and that the money could be demanded before it was paid over; and in the course of the judgment in that case it was pointed out that the Common Law right to recover money paid under an illegal contract was untouched by the Statute. Now our section of the Police Act—Section 12—is similar to the section in the English Statute to which attention is drawn in that case, making all contracts or agreements by way of wagering void. This clearly was a wagering contract, and it was void under the Statute; but it was not only void under the Police Act, but it was also a transaction in respect of the application of money for an illegal purpose, and, therefore, under the authority of the case of *Bone* v. *Ekless*, independent of the Police Act, the plaintiff was entitled to recover it back before it was paid over. The only question seems to me to be whether, upon the facts before the Magistrate the money was, in effect, paid over—whether the conduct of the defendant in respect to that money amounted to a paying over to the winner. Robinson, the stake-holder's evidence, is to the effect that at the conclusion of the fight he took the stakes into the ring and offered them to the winner (Hindmarsh), who said, "keep them till the morning, I have nowhere to put them." I have no hesitation in saying that that is not a payment over to the party for whom the stakes were being held as contemplated by the Statute, or by the authority to which I have referred. He still had the money in his possession; he had not parted with it to anyone,

(*a*) 1852, 12 C.B., 468. (*b*) 1838, 3 M. & W., 434.

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and before he had parted with it to anyone the plaintiff had given him notice that he required the money to be paid to him. For these reasons I am of opinion that the Magistrate was wrong, and that the appeal should be allowed.

HENSMAN, J. I am of the same opinion. It is quite clear from the evidence that was given, and from the statements of the learned counsel, that this was a prize fight. It was, therefore, an illegal act. All who took part in it were guilty of a breach of the peace, and the persons there present formed an unlawful assembly which the police ought to have dispersed. The authorities which have been referred to shew that the Court will not enforce an illegal contract, but it will allow a party to recover his money back before it has been paid over. In the present case the money was not paid over, and the plaintiff had a right to recover it. It is unnecessary to consider whether this transaction would have been void as a bet before the passing of the Statute. It may be that, until the Police Act of 1893 was passed, wagers were not null and void, but it is unnecessary to decide that point. This was an illegal contract, and the plaintiff came into Court not to enforce it, but to shew that it was one the law will not recognise. I am of opinion that the Magistrate was wrong, and that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *E. A. Harney.*

Solicitor for respondent: *F. M. Alcock.*

MOYLAN, PLAINTIFF (APPELLANT).

SALINGER AND COHN, DEFENDANTS (RESPONDENTS).

1901.
Sept. 20.

The C. J.
Hensman, J.

Promissory note—Endorser—Co-maker—Contemporaneous verbal agreement—Variation of written agreement—Evidence to shew payment out of particular fund.

This was a motion to reverse a judgment of Pennefather, J., in favor of the defendant Cohn, dated 21st May, 1901, or in the alternative, for a new trial.

The action was for the recovery of the amount of a promissory note made by the defendant Salinger in favor of the plaintiff and endorsed by the defendant Cohn.

Judgment went against Salinger by default, and she having become bankrupt, the action proceeded against Cohn as endorser of the note or alternatively as co-maker.

At the trial it was contended on behalf of the defendant Cohn that he endorsed the promissory note on the verbal understanding that he would not be called upon to pay it, and upon this ground the Judge decided in his favor. The plaintiff now appealed.

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Held, that such an understanding varied the written contract contained in the promissory note, and being made contemporaneously was not binding on the plaintiff, and that accordingly the appeal must be allowed.

Northmore, for the appellant. It is no defence to an action on a bill for the defendant to say that he is not liable because there was a verbal agreement that he should not be held liable. *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (*a*). The whole of the learned Judge's judgment went on the 8th plea, viz., that Cohn signed the promissory note relying upon a statement by one Cottrell, that he would take it up out of a fund that he had made as a Hotel Broker, for the sale of a hotel for Mrs. Salinger. Where a bill is drawn in ordinary form, in an action thereon by the payee against the acceptor, evidence is not admissible to shew that it was intended to be paid out of a particular fund. See *Lindley* v. *Lacey* (*b*), *British Mutual Banking Co., Ltd.* v. *Charnwood Forest Railway Co.* (*a*), *Watson* v. *Russell* (*c*), *Campbell* v. *Hodgson* (*d*).

Purkiss, for the respondent Cohn. The Bills of Exchange Act has put the maker of a promissory note in exactly the same position as the acceptor of a Bill of Exchange, and the drawer of a Bill of Exchange in exactly the same position as the payee of a promissory note. Therefore the maker (Salinger) was identical with the acceptor of a Bill of Exchange, and Moylan (the payee) was identical with the drawer of a Bill of Exchange. To give vitality to the bill Moylan should have been the first party to endorse it without recourse, which he did not do, Cohn endorsing first and Moylan underneath. By reason of that Moylan became the holder in due course. When Cohn put his name on the back of the bill it was not endorsed, and was therefore not negotiable. Cites *Steele* v. *McKinley* (*e*), *Jenkins* v. *Coomber* (*f*). The contract was not to attain vitality except in a certain event. The bill was to be held in escrow. It would not have been endorsed by Cohn but for the representations made by Cottrell and Mrs. Salinger that the bills were not to be sent to Moylan, but were to be paid out of the proceeds of the sale of Salinger's Hotel. Until then it was to be inoperative. I contend that in *Lindley* v. *Lacey* it is distinctly laid down that evidence of a parol agreement is admissible. *Bell* v. *Lord Ingestre* (*g*).

(*a*) 1887, 18 Q.B.D., 714
(*b*) 1864, 34 L.J.C.P., 7.
(*c*) 1862, L.J. 31, Q.B., 304
(*d*) Chalmers, p. 57, 5th Edition, 1819 Gow., 74.
(*e*) 1880, 5 A.C., 754.
(*f*) L.R., 1898, 2 Q.B., 168.
(*g*) 1848, 12 Q.B., 317.

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Northmore, in reply. The condition precedent sought to be established by the defendant was "I am not to be liable until the bills are paid." That would not hold because then there would be no liability. If Cohn was not liable as endorser, he was so as a joint and several maker.

HENSMAN, J., delivered the judgment of the Court. In this case the plaintiff sues the defendant Cohn as indorser and also as maker of two promissory notes. We are clearly of opinion that Cohn is not in the position of maker of the notes. The question, therefore, is whether he is liable as indorser. At the close of the evidence for the plaintiff the defendant's counsel moved for a non-suit, on the ground that both notes were incomplete when Cohn indorsed them, and that the plaintiff was not the holder in due course. We are of opinion that Section 2 of the Bills of Exchange Act meets that objection. (Reads section). In the present case the notes are in this form:—"One month after date I promise to pay to James Moylan, or order, the sum of £——" so many pounds. At the time these notes were presented to Cohn (the defendant) there was no signature on the notes, either on the face (or front) or on the back. But Cohn was perfectly aware that he was signing as indorser when he was asked to put his name on the notes. By signing his name, knowing that it was intended that he was to be the indorser, and by handing the notes over to a third person, he gave that person authority to fill them up in a proper manner, and the name of Mrs. Salinger (the maker) and of Moylan, as indorser, were afterwards put upon them. We are, therefore, agreed with the learned Judge on that point, although he did not decide the case upon that question. But it was pleaded that the defendant Cohn indorsed the notes at the request of one Cottrell, the agent of the plaintiff, on the distinct understanding and agreement that he was incurring no liability to pay them, owing to such indorsement, and that the money was to be deducted by Cottrell out of moneys received from the sale of a Hotel property for Mrs. Salinger, which sale Cottrell then said he had already effected. The learned Judge decided the case on that point, and this is how he found:—He said, "I give my verdict under paragraph 8 of the defence, and I find that there was a representation made by Cottrell, the agent for the plaintiff, that he had sold this hotel, and that there was a promise that the money coming to his hands would be devoted to the

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retirement of the bills." We put on one side the suggestion that the learned Judge decided the case on the question of fraud, because the question of fraud is not pleaded. Where we have to differ from the learned Judge is in this: we do not think, for the purposes of this transaction, that Cottrell was the agent for the plaintiff. Even if he were, we are not prepared to go so far as to say that this contemporaneous verbal agreement would be binding, because the law is clear that no mere oral agreement can have any effect in controlling the tenor of the instrument, if contemporaneous with the written agreement. In the present case, if the agreement or understanding with Cottrell were to be binding on the plaintiff, the instrument and its meaning would have been varied, because the understanding was that it was to be paid only out of funds coming into the hands of Cottrell eventually. Before I leave this point I must observe that no doubt there are cases in which a note may be held, as in the nature of an escrow, but the meaning of that appears to us to be this: that it is to be held to be of no effect until a certain condition has been performed. That does not vary, add to, or take away from the writing, by any contemporaneous verbal agreement, but it is merely that that instrument is to be held to be of no effect until a certain condition has been fulfilled, or a certain event has happened. That is not so here. These notes were put forth as negotiable instruments, but the verbal agreement was that they were to be paid only out of a particular fund. Such an agreement would vary the nature of the instruments. For the purposes of this particular agreement, however, we are of opinion that Cottrell was the agent of Mrs. Salinger, and not of Moylan, the plaintiff. Mrs. Salinger was being pressed for payment. Cottrell was her agent in regard to the sale of the hotel. Cottrell stated that Mrs. Salinger had allowed the funds arising from the sale to pass through his hands, and that he was authorised by her to pay the notes out of those funds. That being so, we think the learned Judge was mistaken in holding, on those facts, that this was a representation made by Cottrell, as the agent of the plaintiff. It is true he was the agent of the plaintiff for some purposes, but not in respect of this agreement. A number of cases have been quoted, and counsel have put their argument clearly, but we are of opinion that these cases are not applicable to the facts before us. Before we conclude, we desire to say that the learned Judge expressed sympathy with the plaintiff in these words:—" I

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cannot help expressing my sympathy with Mr. Moylan, because I consider he is an innocent person in this transaction, but, unfortunately, his agent has made him responsible for his acts." We are glad to see our way to carry out what the learned Judge desired to do, and which we think he will be glad to know that we have been able to do, namely, to give judgment for the plaintiff. We are of opinion that this appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Barker & Boultbee.*

Solicitors for respondents: *Haynes & Purkiss.*

HUMMERSTON, PLAINTIFF (RESPONDENT).

THE NORTHAM TOWN COUNCIL, DEFENDANT (APPELLANT).

1901.
Sept. 20.

The C. J. *Hensman*, J.

Hire of horse, cart and driver—Master and servant—Negligence of driver.

This was an appeal against the judgment of the Local Court at Northam, dated 16th May, 1901. An action for damages was brought by the plaintiff for the loss of his horse while engaged in the service of the defendant Council, to whom the horse had been loaned, together with its driver, by the plaintiff. The defendant Council was making a dam across the river Avon, and the plaintiff's horse, cart and driver were used by the defendant Council to cart clay to the embankment. While engaged in this work the horse fell into the river and was drowned. The Magistrate held that the driver was the servant of the Council, and that it was through his negligence that the accident occurred, and accordingly found for the plaintiff.

On Appeal.

Held, that the accident was caused by the negligence of the plaintiff's servant, the defendant Council could not be held responsible.

Burt, K.C., for the appellant. The Magistrate was wrong in finding that the driver was the servant of the defendant Council, and that they were responsible for his negligence. Although the driver was the particular servant of the defendant Council, so far as the operation he was engaged upon was concerned, yet he was the general servant of the plaintiff, and the defendant Council could not be held liable for his negligence. See *Rourke* v. *White Moss Colliery Co.* (*a*), *Jones* v. *City of Liverpool* (*b*), *Donovan* v. *The Laing, Wharton & Down Construction Syndicate* (*c*).

Sayer, for the respondent, cited *Murray* v. *Currie* (*d*). The

(*a*) 2 C.P.D., 205.
(*b*) 14 Q.B.D., 830.
(*c*) 68 L.T., 512.
(*d*) L.R., 6, C.P., 24.

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driver was *pro hac vice* the servant of the Council ; he was engaged in their work alone, under the directions of their officers, and they were liable for his act of negligence.

STONE, C.J. The question is whether the hirer of the horse and cart was responsible to the owner of the horse and cart for the damage done to the horse by the negligence of the driver. The Magistrate of the Local Court found that the defendant Council (the appellant in this appeal) was not guilty of any negligence but was responsible for the negligence of their particular servant, the driver, William Smith, in causing the loss of the horse. The case appears to me to have been decided from a standpoint that is not at all applicable to the particular circumstances that have been brought to the attention of the Court. Those cases all had reference to an action of tort by a third person against another who had been guilty of an act of negligence that had caused injury to him. This is not at all one of those cases. This is a case where the letter or bailor of a cart let it, with the driver, and a clear distinction exists between such an action and the cases to which our attention has been called. The distinction is clearly pointed out in the case of *Coupé Co.* v. *Maddick* (*a*), and that is the only case near the particular circumstances of the case we are now dealing with that I have been able to come across. This may perhaps have resulted from the fact that the point has not been raised, because it is acknowledged that under such circumstances a bailee cannot be held responsible. The head note is as follows :—" The defendant hired a carriage and horse from the plaintiff, and the defendant's coachman in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction. Whilst he was thus engaged, the carriage and horse were injured owing to his driving. It was held that there was a contract as bailee for which the defendant was liable." In the course of argument in that case counsel for the defendant contended that there was no distinction between such a case as that and an action of tort brought by a third person. Mr. Justice Kay, in the course of his judgment, said :—" Mr. Mills, who argued in this case, contended that the ground of liability is the same . . . . where a wayfarer is injured he has a right of action founded on tort . . . but where a man employs a horse and carriage there is an implied

(*a*) 1891, 2 Q.B., 413

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contract to return them in the same condition . . . . not against the servant." It will be seen that in that case the hirer employed his own servant to drive, and it was in consequence of the misconduct of his own servant that the injury was done to the letter or bailor's property. But the case before us differs in this respect, that the hirer (the Council) did not employ their own servant but they hired the horse, cart, and servant of the plaintiff. The action therefore arises in respect of a contract and not in respect of a tort. There was a duty on the part of the Council to return to the plaintiff the horse and cart uninjured. If it were injured through their negligence they were responsible. It is alleged that it was by their negligence that this horse was injured, because the servant was guilty of negligence, but the servant, although the particular servant of the Council in respect of the employment for which this cart and horse were engaged, was the general servant of the letter or bailor—the plaintiff. This position of a "general" servant and a "particular" servant was recognised in the case of *Rourke* v. *The White Moss Colliery Company* (*a*). That case, and the other cases to which our attention has been drawn were very fully referred to in the case of *Jones* v. *Scullard* (*b*) which was tried by Lord Russell of Killowen. He went thoroughly into all these cases cited by counsel (and more particularly known as the "carriage cases") and he pointed out that it had been decided in the case of *Rourke* v. *The Colliery Co.* that a servant had really served two masters. So, in this case, Smith, the servant of the plaintiff, was the servant also of the Council in connection with the particular work that the horse and cart was to be engaged upon. But I do not think it matters at all in this case in what position Smith was with regard to the service in which he was engaged—whether at the time he was the servant of the Council or of the plaintiff—because it is necessary for the plaintiff to shew in an action of this character that the defendant Council had been guilty of some breach of duty towards the plaintiff in respect to the loss of this horse. Now what possible breach of duty can the Council have been guilty of when the Magistrate of the Local Court decides that they were not guilty of negligence—that this horse was not lost through their negligence but through the negligence of the person who had been supplied to them to look after this particular

(*a*) 2 C.P.D., 205 (*b*) 67 L.J., Q.B.D., 895.

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horse? Had the Council employed their own servant, and had that servant been guilty of negligence through which the horse had been lost, then the principle of *respondeat superior* would apply, and the Council would have been liable. But here they did not appoint such a servant: they leave the charge of the horse and cart to the man who is supposed by his master, and who they have a right to expect, in consequence of the master having employed him, to be a competent man. They were not to suspect when they hired the horse and cart that the plaintiff would have placed that horse and cart in charge of an incompetent man. Indeed it seems that the plaintiff had a very good opinion of the man as a competent man. But in that opinion he must have been mistaken, because we find this servant making a very great mistake, and being guilty of great negligence in taking that horse to a very dangerous spot. It seems to me, under those circumstances, that the plaintiff has entirely failed to shew any grounds of action against the Council. He has proved no breach of duty whatever on their part towards him. Indeed it is rather the reverse. They had the plaintiff's own man in charge of this horse and cart, and although the accident may have happened whilst he was engaged in carrying out the operations of the Council and was under the control of the Council at the time the accident happened, still that, in an action of this nature, does not in my opinion throw any responsibility on the Council for neglect on his part. The accident was caused entirely by the neglect of the plaintiff's own servant, and the Council cannot be held responsible.

HENSMAN, J. I am of the same opinion. The question to be considered is: What was the contract between these parties. The foreman of the plaintiff said: "I made an arrangement to supply a driver at fifteen shillings a day to work on a dam." The plaintiff said: "Smith, the driver, was sent by me to drive the horse. I supplied the fodder. Smith, after working hours had to bring the horse back to me." I think it is clear that the contract (although there was no express provision to that effect) was to supply a fit and proper man who would obey the orders of the defendant's manager. If the contention of counsel for the plaintiff is correct, there was an implied contract entered into by the Council to ensure the horse from the driver's negligence in acting in direct disobedience to the Council's orders. The Magistrate has found that there was no

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neglect on the part of the defendant Council. The evidence in fact shews that the driver, against the express orders of the manager or time-keeper of the works, took the horse into a dangerous place, There being no breach by the defendants of any duty cast upon them, and no negligence on their part, and the accident being caused by the driver's disobedience of the orders he was employed to obey. I fail to see what cause of action there can be against the defendant Council. We have been unable to get any precise authority upon the point. That may be because the point has never been previously raised. A great Judge has said : " The clearer a thing is, the more difficult it is to find any express authority upon it." That may be the reason why there cannot be found an exact authority upon the matter. The case has to be decided according to principle and common sense ; and I think that no one who has listened to this argument could have doubted that it would be unjust and contrary to principle to make the defendants liable for the negligence of a man who was sent by his general master to obey the orders of the defendants and who has destroyed his master's property by disobedience of those orders.

Judgment for the plaintiff was set aside and judgment entered for the defendant Council, with costs of the appeal, and of the Court below.

Solicitors for appellant : *Stone & Burt.*

Solicitor for respondent : *W. F. Sayer.*

FLANNERY & CO., PLAINTIFFS (RESPONDENTS).

HARRY BEATRIX DEFENDANT (APPELLANT).

1901.

Sept. 23.

The C. J.
Hensman, J.

Local Court—Payment of freight—Cart note—"Freight payable on delivery"—Carrier's lien—Waiver.

This was an appeal from a judgment of the Local Court at Menzies, dated 15th May, 1901. The plaintiffs, who were forwarding agents, claimed against the defendant, a carrier, £87 9s. 1d. for goods sold and delivered to him. The defendant counter-claimed for £46 for the cartage from Menzies to Mount Morgans of certain beer, on the instructions of the plaintiffs that the beer was to be delivered to one Harris, the consignee. When the goods arrived at Mount Morgans Harris was not there, and, acting under the plaintiffs' instructions, the defendant stored the goods with another person. The terms of the cart-note were " Freight payable on delivery." The Magistrate held that the plaintiffs were not liable, as the terms were that the freight on the goods was to be paid for by the consignee and that the defendant, when he handed over the goods, waived his lien upon them and consequently his right to sue the

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consignor. He gave judgment for the plaintiff for the full amount claimed but gave judgment on the counter-claim for £13 10s. only. The defendant appealed.

On Appeal.

Held, that the defendant was entitled to have judgment entered in his favor for the full amount he counter-claimed for.

Haynes, for the appellant. The cart note threw upon the plaintiffs the duty of paying the freight. The cart note made both consignee and forwarding agent liable, and the carter should proceed against both. He had a lien on behalf of both, but when directed by the consignor to hand over the goods to another he had finished with the consignee, and therefore looked to the consignor. At Common Law where there is an agreement to carry goods there is an implied agreement by the consignor to pay the freight. See *Oppenheimer* v. *Russell* (*a*), *Domett* v. *Beckford* (*b*), *Moore* v. *Wilson* (*c*), *Dawes* v. *Peck* (*d*). If the carter cannot deliver where the consignor directs him to he must look to the consignor for payment.

Harney, for the respondents. The defendant knew, when he took the cart note, that freight was to be paid on delivery. When the property has passed from the consignor the presumption of law is that the carrier is then the consignee's agent and must look to him for payment. The cart note very strongly strengthened that presumption. It was not until 12 months had elapsed, and not until sued by the plaintiffs, that the defendant set up his claim and alleged that his contract was with Flannery. See *Great Western Railway Co.* v. *Bagg* (*e*).

STONE, C.J. This is an appeal from a judgment given in an action tried in the Local Court of Menzies, in which the plaintiff sought to recover from the defendant the sum of £87 9s. 1d. for goods sold and delivered. To that claim the defendant counter-claimed in an amount of £66 1s. 6d. for the carriage of certain goods for the plaintiff and also for demurrage in connection with the carriage of those goods. It appears that in the course of the trial the sum of £25, an amount admitted to be due by the defendant, was paid to the plaintiffs' solicitors. The Magistrate of the Local Court, however, appears to have given judgment for the full amount of £87 9s. 1d. in respect of the plaintiffs' claim and to

(*a*) 3 Bosanquet & Puller, p. 42.
(*b*) 5 B. & Ad., 521.
(*c*) 1 Term Reports, 659.
(*d*) 8 Term Reports, 330.
(*e*) 54 L.J.Q.B., 599.

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have given judgment for the defendant, in respect of his counter-claim, to the amount of £13 10s. From that judgment the defendant appeals upon the ground that judgment on the counter-claim should be entered for the defendant for the full amount, upon the ground that on the facts found by the Magistrate, judgment should so enter, and that the Magistrate was wrong in holding that the defendant had waived his claim against the plaintiff and was wrong in holding that the defendant by delivering the goods to the consignee must look to the consignee for payment of the cartage. The appeal is entirely upon the points of law raised in the Notice of Appeal and our decision will depend upon whether, upon the findings of the Magistrate, the defendant is entitled to succeed in respect of the whole of his counter-claim. It appears that the defendant was employed by the plaintiff, who is a carrier and also a delivery agent, to convey some casks of beer to one Harris. The defendant in carting those goods made two distinct deliveries. It appears that the first lot he delivered in good order, but the second lot was delivered in an indifferent condition. At the time when the defendant arrived at his destination with the first lot of beer Harris (the consignee) was absent, and after some delay the defendant telegraphed to the plaintiff for instructions as to what to do with that particular lot of goods, and the plaintiff instructed him to store them with some one else. This the defendant did, and it was in respect of the delay that occurred on that occasion, in consequence of the consignee being absent and no one being ready to accept delivery on the consignee's behalf, that the defendant claims demurrage. With regard to the second delivery the Magistrate has found that the goods were delivered within a reasonable time, and that, although they may have been damaged, that damage (if any) was caused by the act of God and not by the negligence of the defendant, and that the consignee accepted delivery of the goods and did not refuse payment on account of any damage that had been done to them, but simply by reason of directions he had received from the plaintiff not to pay the defendant. The Magistrate also found that the plaintiff was the consignor of these particular goods, and, although a forwarding agent, he was responsible because he did not disclose the name of the principal for whom he was acting, and that the name of that principal was unknown to the defendant at the time he engaged to carry these goods. It was contended on the part of the plaintiff that the defendant under the circumstances was

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bound to look to the consignee for his freight, and that he did indeed look to the consignee, but having failed to obtain payment from him he, after some delay, when the plaintiff took proceedings against him, counter-claimed in respect of this freight, for the carriage of the goods in question. Upon the defendant taking delivery of these goods the plaintiff handed to him a cart note which expressed upon the face of it that the freight was payable by the consignee, and it is urged that that in effect throws upon the defendant the responsibility of recovering his freight from the consignee and not from the consignor. A distinction is also drawn, or has been attempted to be drawn, in that the consignor in this case was merely a delivery agent and that the goods did not belong to him. The Magistrate's finding, however, to the effect that the contract was entered into by the plaintiff without notice to the defendant, who the owner was, I think precludes the plaintiff from taking advantage of that position, because the only privity of contract that existed was between the plaintiff (who placed himself in the position of consignor) and the defendant (who was the carrier). The case referred to by Mr. Haynes, *Domett and others* v. *Beckford* (*a*), appears to me to be a distinct authority as to the meaning to be given, and the effect to be given, to words such as those which were inserted upon this cart note, namely, that the consignee was to pay the freight, and it is a direction to the carrier to receive the freight on behalf of the consignor. If the delivery agent desired to relieve himself of all responsibility in connection with the payment of the freight, all he had to do was to mention the name of the owner of the goods and it would have been well for him also not only to mention the name of the owner of the goods on whose behalf the carrier was to take those goods to the consignee, but also to mention in the cart note or consignment note the name of the owner in the same way as owner's names are frequently mentioned on bills of lading:— "Shipped by so-and-so, on behalf of so-and-so, to be delivered to so-and-so, the consignee." But there has been no mention of the owner of the goods or of any other consignor but that of the plaintiff. In fact, throughout these proceedings and up to the present, as far as I am concerned, I am totally ignorant as to who the owner of these particular goods is. His name has never been mentioned throughout the proceedings, nor was it mentioned

(*a*) 5 B. & Ad., 521.

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throughout the proceedings before the Magistrate of the Local Court. In the case of the *Great Western Railway Company* v. *Bagg and others* the head note is that "Where a consignor delivers goods to a Railway Company, to be carried under a consignment note which states that the carriage is to be paid by the consignee, he may nevertheless be sued by the Railway Company (that is the carriers) for the carriage." If the owner refuses to pay, the true construction of the contract is that the consignor, whilst stating that as between the consignee and himself the former is to pay the carriage, undertakes that upon the carriers performing the agreement and carrying the goods to their destination, to be answerable for the freight that is not paid by the consignee. Lord Coleridge, L.C.J., in the course of his judgment in that case said, "I think the effect of the contract appearing on the note is this: the defendant says to the company 'we want to send these goods to the consignee. Will you forward them for us? As between the consignee and ourselves he has to pay the carriage, but if he does not, of course, we will pay you on your performing the work we ask you to do, on carrying the goods to their destination.'" He goes on to say: "It is perfectly clear from the evidence in the County Court that the Judge ought to have drawn the inference of the contract between the sender and the carrier, and there is, in my opinion, no ground for the contention that the Railway Company concluded the contract with anyone else. The freight must therefore be paid by the consignor." And so it is in this case. There is nothing to shew any contract whatever between anyone else than the plaintiff (who assumed and took upon himself the position of the consignor) and the carrier, and the mere insertion, in the contract note, of the words to which I have referred has no more effect than those words which were inserted in this case that I have just cited:—"Who pays carriage? —consignee." It was held that that was a mere direction that, as between the consignee and the consignor, the consignee would pay, but that the consignor would pay the carrier in the event of the consignee refusing to pay. Now in this case the consignee refused to pay the defendant. The plaintiff had some claim against him in respect of goods delivered, and the defendant does not seem to have troubled himself about making any claim against the plaintiff until the plaintiff set up this claim against him. Then I think he rightly counterclaimed in respect of this cartage, and is entitled, upon the finding

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of the Magistrate, to have judgment entered for him for that amount.

HENSMAN, J. I am of the same opinion. This action (which is the form of a counter-claim) is by a carrier against a consignor for charges for carrying goods. Two lots of goods were consigned to a person named Harris. They were sent by road. When the first lot of goods arrived at its destination Harris was not there, and the consignor instructed the carrier to deliver them to another person, which he did. The second lot of goods were delayed upon their journey by reason of heavy rains, but were delivered from time to time to Harris, the consignee. Flannery, in his evidence, says:—"I employ teamsters from time to time to carry goods to my clients." *Prima facie* he was the consignor. He is called a forwarding agent, but he was contracting with the carrier, in his own name, on the part of an undisclosed principal. He says:—"The carter has not a lien on the goods. I direct the carter as to how the cartage is to be collected." If the contract was between the carter and the consignee, what has the consignor to do with directing the carrier how he is to collect the money? Again Flannery says:—"Harris was not there when the goods arrived at Morgans. Harris did not pay him, because he was not there, and he parted with the goods to Lannin. I do not remember telling Harris not to pay the carter. I do not think I did. My office may have done so." The findings of the Magistrate were:—That there was a clear acceptance by the consignee of both loadings; and that he did not refuse the payment requested of him by the carter, for any reason other than the plaintiffs' directions. I agree with the Chief Justice that the words on the cart note are merely a direction (put in, as the evidence shews, without any knowledge on the part of the carrier) to the carter to collect the money for the consignor from the consignee. With regard to the second lot of goods, which it is said Harris refused to pay for because they were damaged during their transit, the Magistrate has found that the goods were damaged by act of God, that is, by heavy rains making the roads impassable for a time, an occurrence for which a common carrier is not liable. At the trial an enormous amount of evidence was taken, and a great number of legal points were raised. When the case is stripped of irrelevant matter it becomes, however, clear and simple, and I am of opinion

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that the carrier is entitled to be paid by the consignor, with whom he made the agreement.

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Appeal allowed with costs, less costs occasioned by the appeal on the claim (if any). Judgment to be entered in the Local Court for defendant on counter-claim with costs. Judgment for plaintiff on the claim to stand.

Solicitors for appellants: *J. & R. Maxwell.*

Solicitors for respondents: *Penny & Hill.*

C. HOCKIN, DEFENDANT (APPELLANT).

L. H. NOYES, PLAINTIFF (RESPONDENT).

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Sept. 27.

The C. J. *Hensman*, J.

Local Court—Wrongful admission of evidence—Verdict against weight of evidence—Agreement for lease—Habitable premises.

This was an appeal from a decision of the Magistrate of the Local Court, Perth, dated 24th May, 1901. The defendant and a friend, who were resident at Kalgoorlie, made an agreement with the agent of the plaintiff for the lease of plaintiff s house at Busselton for the purpose of a boarding house. The agent represented that the house was fit for such a purpose, and that it contained eight rooms. An agreement was entered into setting out these facts and providing for a six months' tenancy. The defendant paid a months' rent in advance without having seen the house. Subsequently she found that the house was only a six roomed one and was in an uninhabitable condition. A second agreement was then entered into embodying the same terms as before, but binding the plaintiff to repair the house, and if required by the defendant, to put up two more rooms. This contract, the defendant alleged, had not been carried out, and she gave up possession after having paid a second month's rent in advance. The action was for the recovery of the rent for the balance of the term. The Magistrate held that the house was habitable, and gave judgment for the plaintiff.

On Appeal.

Held, that the judgment of the Magistrate should stand.

Harney, for the appellant. The evidence tendered on behalf of the plaintiff as to the condition of the house was inadmissible, inasmuch as it related to an inspection of the premises, not at the time of letting, but some months subsequent thereto. There was no evidence that the premises were habitable or reasonably fit for occupation on the date the tenancy commenced. The defendants were entitled in law to repudiate the tenancy. The condition precedent to the contract was never satisfied because the house was let on condition that certain things would be done which were not done.

Alcock, for the respondent. Everything was done which the defendants asked for, as shewn by the evidence in the Court

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below. The defendants signed an inventory and expressed satisfaction with the house after having slept therein.

Stone, C. J. This is an appeal from the decision of the Magistrate of the Local Court, Perth. The action was for £20 19s. 3d. rent payable by the defendant under the terms of an agreement with the plaintiff. The defendant counter-claimed for £10 damages, and also denied liability on the ground that the premises let were uninhabitable. The Magistrate found, after hearing a great deal of evidence, that the premises were habitable, and he gave judgment for the plaintiff for the amount of his claim, and the same with regard to defendant's counter-claim. The defendant appealed against that decision of the Magistrate on the grounds (1) that he wrongfully admitted evidence as to the state and condition the premises (the subject of the agreement) were in on dates prior to and subsequent to the commencement of the tenancy, (2) that there was no evidence that the premises were reasonably fit for occupation on the date that the tenancy commenced, and (3) that the determination of the Magistrate was against the evidence and the weight of evidence. Dealing first with the second point raised, I am of opinion that there was ample evidence upon which the Magistrate could find that the premises were habitable; because, looking at the evidence of the plaintiff and his wife, and the letters which passed between defendant and plaintiff, it seems to me that the substantial objection that she made to the premises was really on account of the papering coming off the walls, and also of some damage to the oven, but she never complained of the dampness of the walls at any time. They remained on in possession, paying rent, but only pressing for a rectification of the delapidations in respect of the paper and of the oven, making no reference whatever to the dampness of the walls, and indeed, when they gave up possession, it did not appear that they gave up possession on that account, but because the plaintiff had refused to do some other things which they required in connection with the premises. In one of the last letters written by one of the defendants on the 3rd December she says:—"We have had the house for five weeks with the use of only five rooms, instead of eight we agreed for, and being unable to use the oven, we consider that you ought to make some reduction in the rent until we have the other rooms with the stove. We are advised

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that this is a reasonable request." She makes there no reference whatever to any dampness of the building, or that she could not remain in the building in consequence of the dampness of the walls, but she was complaining of the papering in the room and the damage to this stove, and she also complained of the fact that she was paying twenty-five shillings a week, which was a very heavy rent for the cottage when there were better houses available for one pound a week, and then she suggests that "would it not be better for Scott to buy a piece of spouting and put it at the back of the house?" In another letter, dated the 19th November, she does not again allude to the dampness of the house, but she says, "shall I get an estimate from Wood for re-papering the drawing-rooms? You do not seem able to match the paper. We cannot possibly use the rooms with the paper dropping off the walls, and we need it very badly. All this delay is a serious matter. We did not get the tank nearly full," and so on. So according to the defendant's own account and her complaints to the plaintiff she was not complaining of this dampness of the house, which it is alleged now, rendered it unfit for habitation. I think the Magistrate might have come to the conclusion, upon the evidence, that it was reasonably fit for occupation. But there is some evidence that he admitted, that he should clearly not have done, and it is possible that that may have operated upon his mind to a certain extent in coming to the conclusion he did. But, as I said just now, sitting as a jury, he had ample evidence before him to come to the finding that he did. This being so, it seems to me that we should really be doing the defendant no service at all by sending this case for a re-trial, because all she would be able to do would be to submit similar evidence to that she submitted on the first trial, excluding that to which objection has been taken, and it will result simply, in all probability, in the defendant being put to unnecessary cost. As we have power to draw inferences of fact, and as I think that there was evidence upon which the Magistrate could come to the finding that he did, it seems to me that we would be doing more justice between the parties if we were to refuse the new trial, but allow the defendants something in respect of their counter-claim, because the plaintiff did take advantage of them in this respect, that he got them to pay the rent in advance, when, under the terms of the agreement, there was no occasion for the tenants to do so. Had that not been so, it is a question whether

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they would not have been able to have refused payment of rent until the premises were in a condition as contemplated by the parties, that is, until this stove had been repaired and until the room had been papered. The plaintiff did afterwards affect those necessary repairs, but meanwhile the defendants had been put to the inconvenience of living in this place in the state it was, not being able to use one of the rooms—the room where the paper was falling off—and I think they are fairly entitled to a reduction of the rent under those circumstances. But for their occupation of the house, the rent, I think, should not have been payable until the place was really in the state contemplated by the parties, without regard to the stove and papering. Under these circumstances I think that the defendants ought to be allowed to succeed on their counter-claim to the extent of £8, that is in respect of the rent that they had paid during the two months that they were in occupation, that is not returning them the whole amount of the rent they paid, but I think £8 is a fair amount to estimate in their favor, and that the plaintiff should succeed on this claim in respect of the rent. The judgment shall stand in the Court below for the plaintiff for rent, but there should be judgment in respect of the counter-claim for £8 in favor of the defendants, and the plaintiff should have his costs in respect of the claim, and the defendants theirs in respect of their counter-claim, but there should be no costs of this appeal.

HENSMAN, J. I am of the same opinion.

Alcock asked for costs to the plaintiff on the higher scale.

Harney objected.

STONE, C. J. We think that the order should be—costs of both sides on the lower scale.

Solicitors for appellant: *Harney & Harney.*

Solicitors for respondent: *F. M. Alcock.*

1901. Oct. 1

McLAUGHLIN AND CARROL, DEFENDANTS (APPELLANTS).

FREMANTLE MUNICIPALITY, PLAINTIFFS (RESPONDENTS).

Special contract—Land regulations, 1882—Enjoyment of corporation with land—Implied contract—"Assumpsit"—Trespass—Proof of title—Waste.

The C. J. Hensman, J.

This was an appeal from the judgment of Pennefather, J. The plaintiff corporation claimed £50, being the agreed price of 4,000 cubic yards, at 2d. per cubic yard, of stone sold and delivered by the plaintiffs to the defendants. The defendants had a contract with the Fremantle Roads Board for the repairing of certain roads, and for that purpose they

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obtained stone from a block of land known as the "Commonage," which was vested in the plaintiff corporation. The defendants appear to have been under the impression that they were justified in taking the stone by virtue of the provisions of the Roads Act, which empowered Roads Boards to enter upon and take stone from lands contiguous to a road, for the purpose of repairing it. The Fremantle Council had been in the habit of granting licenses for the removal of stone from the Commonage, for which they charged 5s. per month per man. The defendants, when approached by the Council, declined to take out licenses on the ground of the inconvenience it would be to them, and the alleged agreement was entered into as stated above. At the trial, the defendants denied that there was an express contract to pay for the stone, and questioned the plaintiff's title to the land from which the stone was taken. The Judge found that there was an implied contract and that the Council was legally entitled to recover for the value of the stone taken, and entered judgment for the plaintiffs for £46 and costs.

On Appeal.

Held, that the Judge had sufficient evidence before him to find a special contract to pay for the stone and that the appeal must be dismissed.

Sayer (*Hensman* with him), for the appellants. The evidence disclosed no special contract to pay for the stone, and the order vesting the land in the Council never having been gazetted they were not entitled to sue. By Reg. 32 of the Land Regulations, 1882, it was essential that any order vesting land in a Corporation for the purpose of endowment should be published in the *Government Gazette*, which was not done in the present case, and the vesting order was, therefore, nugatory. The plaintiffs waived the trespass by the defendants, and sued on an implied contract in "*assumpsit*," but, having waived the trespass they must prove their title, and that the stone was theirs to sell. Furthermore, assuming that the land had been properly vested in the plaintiffs, being in the nature of an endowment, it gave them no right to commit waste, and to take stone from the Commonage was to commit waste. *Lee* v. *Shore* (*a*).

Burt, K.C., (*Gawler* with him) for the respondents. The plaintiffs clearly proved their title by the production of the vesting order. Reg. 32 of the Land Regulations did not require the publication of the vesting order in the *Gazette*, but it *did* require the rents and profits to be paid to the person having the management of the reserve. The latter portion of the regulation was not mandatory but was merely a direction to the Governor that he might publish the order in the *Gazette*. The publication was a discretionary proceeding, and not a condition precedent to the order being effectual. Under the implied contract the defendants were bound to pay the value of that which they took. The defendants were found taking the stone, they were

(*a*) 25 R.R., 317.

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brought to book, and thereupon as shewn by the evidence, they agreed to pay. The Council waived the tort and sued for the value of that which the defendants took.

Hensman, in reply.

STONE, C.J. I am going to deal with the appeal simply as regards the finding of the Judge upon the facts. I do not think it necessary to say anything with regard to the other point which has been argued before us, namely, the effect of the reservation and the order of the Governor-in-Council, which has been published in the *Government Gazette* as provided by the regulations. This being an appeal from a Judge upon the facts, we must not be too ready to come to the conclusion that he was wrong, and we must not be too ready to say upon the evidence that there was nothing upon which he could have arrived at such a conclusion as he did. I think it is a great pity that the same rule does not obtain with regard to these appeals from Judges upon the facts as obtains with regard to appeals from a jury. I have never been able to understand why it should be so, particularly when one bears in mind that there is no appeal from a Magistrate of the Local Court upon a question of fact. He is the sole judge of the facts even though the action may involve an amount up to one hundred pounds. But with regard to Judges of the Supreme Court, it appears that where the sum is of a trifling amount of £20, an appeal is allowed from a Judge upon the facts, and we cannot deal with an appeal by the same rule as we could if it were an appeal from a jury, namely, that he has come to a decision such as no reasonable man could come to upon the facts before him. With regard to the first point, that there was no evidence before the Judge, I think that there was clearly evidence before him upon which he could come to the conclusion that he did. The defendant Carrol, it appears, according to his own account, had been from April to September taking stone oft this reserve that was in possession of the Municipal Council, and upon being visited in July by the Council Ranger, and his attention being drawn to the fact that he had no license, he objected to take out the license because it was inconvenient, but he afterwards accompanied the Ranger to the Council office and there, in the presence of the Town Clerk, a conversation took place, and the defendant stated that he did not want any bother about the matter, but that he would pay for the stone. It appears that at that time the price he was to pay was not

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fixed, but afterwards, according to Mr. Taylor's evidence, he saw the defendant Carrol and told him that the Council had decided to charge him three pence (3d.) per yard. He then made some demur, but said as the price was fixed he would have to pay it, and it appears that subsequently to that Taylor again saw him somewhere near or on the road upon which he was performing his contract, and in reply to Taylor he said he would pay when he got settled with the Roads Board, and it was agreed between them that Maguire was to take the measurements. After this again, in the presence of Maguire, he again said that he would pay when the Roads Board settled with him. This was certainly evidence of a contract to pay for this stone that he was taking at the price of three pence per yard. Mr. Humble corroborates that conversation to a certain extent, and says that "Carrol, the defendant agreed to pay for the stone if we did not proceed against him," and that he told him then that threepence per yard was the price that had been fixed by the Council. The price does not appear to have been fixed until August (this was July), but at any rate the conversation between Taylor, Humble and the defendant was to the effect that threepence was to be the price, and with that price Carrol appears to have fallen in, because he subsequently said that he would pay when he had been settled with by the Roads Board. It is true that Mr. Humble said in cross-examination that the impression left on his mind by the defendant was that he was willing to pay the price, but I do not attach much importance to that admission by Mr. Humble in the face of the conversation deposed to by Mr. Taylor. At any rate the learned Judge has this evidence before him, and he had this advantage, that he saw and heard the witnesses, and little things may be said in the course of an examination of a witness that do not appear upon the Judge's notes. I remarked this because I notice that the learned Judge, in the course of his judgment, referred to incidents which do not appear on his notes of the evidence, and that is another reason, I think, why we should be careful not to interfere with the Judge's finding on the facts where he has had *viva vove* evidence before him and not written testimony, because you cannot rely altogether upon the notes giving a perfectly accurate account of all that was said at the time. In my opinion there was plenty of evidence upon which the Judge came to the decision he did of the special contract to pay this price. The fact of the defendant going on afterwards up till September and taking this stone, and

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no proceedings being taken by the Council, would also weigh with one to a certain extent when we are dealing with the evidence given by the plaintiff's witnesses taken in connection with the contradiction of the defendant, and altogether I do not think that I should come to a different conclusion upon the evidence than that which the learned Judge did.

HENSMAN, J. I am of the same opinion. The learned Judge decided this case without a jury, upon the ground that there was a contract between the plaintiff Council and the defendants, that they should pay threepence per yard for the stone they took. The question is, first, was there any evidence? I think that there was evidence of an express contract. I agree with the observation of the Chief Justice as to the undesirability of this Court having to deal with questions of fact in these small cases. Was the verdict unreasonable or clearly wrong as being against the weight of evidence? It must be borne in mind that the Judge saw the witnesses and observed their demeanour, and he was in a position to decide which of them he ought to believe. On the one side he had Taylor, who said that there was an agreement to pay for the stone. The price, he said, was fixed later on. He said he spoke to Carrol, one of the defendants, about it, and told him that the Council had decided to charge him threepence per yard, and that Carrol said he would have to pay it. Then there is the evidence of Mr. Humble who gave his "impression" of the conversation. That may be the way in which a careful man will speak. He may not wish to speak too positively, but that is no reason why the Judge should not believe him. He said "Carrol agreed to pay for the stone if we did not press him." The evidence of Humble is that Carrol was told that threepence per yard was the price that had been fixed. Then we come to the evidence of Carrol. Carrol, no doubt, denies that he made any agreement; but McLaughlin, the other defendant, says Carrol told him for the first time about ten or fourteen days before the contract was finished, that the Council would charge threepence per yard for the stone. I think it is clear that stone was taken after Carrol knew that the Council would charge him threepence per yard. On the whole I have come to the conclusion that there was fair evidence before the Judge as to a contract in which the price was agreed upon. With respect to the other point—the question of title—

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counsel have raised interesting points, well worthy of consideration. If we had to decide the question of whether the Council were in a position to sue on an implied contract, or in respect of a tort, I think the arguments would have been worthy of consideration, they have been well put before us, but it is not necessary to give any decision on that somewhat important question.

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McLAUGHLIN AND CARROL *v.* FREMANTLE MUNICIPALITY.

Appeal dismissed with costs, the costs in the Court below to be on the Local Court scale.

Solicitors for appellants: *Speed & Durstan.*

Solicitors for respondents: *Kidson & Gawler.*

W. REYNOLDS, PLAINTIFF (APPELLANT).

R. STRELITZ, DEFENDANT (RESPONDENT).

1901.

Oct. 2.

The C. J. *Hensman*, J

Building contract—Alterations and additions—Penalties—Architect's certificate.

This was a motion to set aside a judgment of the Local Court at Fremantle, dated 12th June, 1901. The plaintiff, a builder, entered into a contract with the defendant to build a house and do certain work in connection therewith on or before the 17th day of January, 1901, for which the defendant was to pay him £525. The contract provided that a fine of £5 should be paid by the contractor for every week, or part of a week, that the contract time was exceeded. It was further provided that notice of any alterations or additions required should be given in writing, and that the difference caused by such alterations or additions in both time and amount, should be computed by the architect, and added to or deducted from the time and amount of the contract. In an action for the balance due under the contract, £82 4s. 11d., the defendant counter-claimed for £30, being twelve weeks' penalties for non-completion within the specified time, after allowing for certain extras done, which were estimated by the architect as equivalent to six weeks' time. The Magistrate found for the plaintiff on the claim, and for the defendant on the counter-claim. Against the latter finding the plaintiff appealed.

On Appeal.

Held, that the decision of the Magistrate was correct and that the appeal must be dismissed.

Barker, for the appellant. Certain additions and alterations, required to be done by the proprietor, were not ordered in writing as provided by the contract; they were not alterations or additions within the meaning of the agreement between the parties, and, by reason thereof, the plaintiff was prevented from completing the works in time, and should, therefore, be relieved of the consequences. As soon as there was a departure from the contract the clause as to penalties was at an end. See *Jones* v. *St. John's College* (*a*), *Roberts* v. *Bury Improvement Commissioners* (*b*), *Holme* v. *Guppy* (*c*), *Russel* v. *Sa da Bandiera* (*d*), *Westwood* v. *Secretary of State for India* (*e*).

(*a*) L.R., 6, Q.B., 115.
(*b*) L.R., 5, C.P., 310.
(*c*) 3 M. & W., 387.
(*d*) 13 C.B. n.s., 149,
(*e*) 7 L.T. n.s., 736.

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Moss, for the respondent. The whole case resolved itself into what would be a reasonable period to allow for the extras. The architect, by the provisions of the contract, was constituted sole arbitrator on that point, and he estimated it at five weeks. The case quoted on the other side does not apply, because there the employers, by their own acts, prevented the contractor from completing, which was not the case here. The ordering of extras did not debar the employer from recovering the penalties, in respect of non-completion, within the time stipulated for in the contract, provided that "the ordering of alterations and additions shall in no way release the contractor from this agreemont." See *Legge* v. *Harlock* (*a*). The plaintiff could not take advantage of the fact that the orders for extras were not in writing, because he had acted upon them and performed the work, and in fact had sued the defendant in respect of them. In the cases cited for the appellant there was no certificate by the architect, but in the present case the architect certified that the allowances as to time and value were reasonable.

Barker, in reply. The defendant could not enforce penalties for non-completion after he himself had prevented completion by ordering extras.

STONE, C.J. Dealing with the last point taken in this appeal first, that there is no evidence to support the judgment, without going very fully into the detalls of the evidence, upon which the Magistrate came to his conclusion, I think that there was not only evidence, but ample evidence, to support the finding of the Magistrate, as to the amount due by the defendant for penalties. The real point is whether those penalties were recoverable under the circumstances. The appellant contends that the proprietor (the respondent) by ordering certain extra works, which are set out in the particulars of his claim, prevented the work being done under the contract, and, therefore, he cannot recover in respect of penalties. Well, the rule of law is very strict with regard to these building contracts, that if the proprietor orders extra works he cannot rely upon the penalty provided by the contract, unless there is something in the contract to shew that these extra works or additions were to be completed within the original time mentioned in the contract, or such time as the architect might allow. Now,

(*a*) 18 L.J., Q.B., 45.

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in this particular contract the builder agreed to complete the building and works mentioned in the specifications, referred to in the contract, on or before the 17th January, 1901. The contract also provided that in case the proprietor should require any alterations or additions, which should be directed by the proprietor or the said architect, in the nature of the works during the progress, "the same shall not be valid unless given in writing, and shall be performed by the contractor subject to all the conditions under this agreement, and shall not vitiate or annul these presents, but the difference, both as to time and value, shall be computed by the said architect, and added to or deducted from the time and amount of the present contract, and his valuation or estimate shall be accepted by both parties to this agreement." Now that proviso clearly, to my mind, shews that it was intended that any alterations or additions that might be required by the proprietors, or by the architect, should be performed within the time mentioned in the contract, that is the 17th January, but that the architect might allow a certain difference of time with regard to the completion of those particular works. Now, in this case, the architect says that he did allow a reasonable time, and, with the time that he allowed, the builder did not complete as required by the contract. In the case of *Jones* v. *St. John's College* the contract was to complete the work within a specified time, and there was also a provision made with regard to extras, in the shape of alterations or additions to the premises, and it provided that with regard to these alterations and additions a difference in time should be allowed to be computed by the architect, and that all the provisions, with regard to the extension of the contract, should apply in respect of those alterations and additions. It may appear somewhat hard upon the contractor that, where extensive alterations and additions are required, he should be bound down to the terms of his contract. Still, if he likes to enter into such a contract, he must be bound by its terms. In this case all we have got to see is whether the provision of the contract, with regard to the time in which it was to be completed, applies to these alterations and additions. It seems to me that that provision was clearly intended to apply to the conditions of the contract with regard to the time in which the work was to be done. The only point taken by the appellant is what I have stated, whether the respondent, by ordering these extra works, prevented the works to be done under

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the contract from being completed within the time specified. Under ordinary circumstances there would have been something in the appellant's contention, but, looking at the contract, I do not think he has been able to support his appeal, and that the decision of the Magistrate is right. It was urged that these works carried out were not in the nature of works within the meaning of the contract, that they were something *dehors* the contract, but if that were so, of course the provisions of this agreement would not apply, but looking at the nature of the works themselves, and the fact that they were included by the architect in his certificate, that they had reference to the buildings and other little alterations connected with the building, it seems to me that they did come within the meaning of the contract, and that they could not be said to have been works outside of it and of a different nature to those contemplated by the parties.

HENSMAN, J. I am of the same opinion. Reynolds, the contractor, undertook to build a house, and to do certain work in connection with the building of a house, for £525, and to complete it on or before the 17th day of January, 1901, and there was a proviso that in case he should not proceed with the work, so as to complete it by that date, he would pay the sum of £5 for every week wherein which the work should remain incomplete after the 17th of January, provided that in case the proprietor should require any alterations or additions, which should be directed by the proprietor or the architect, in the nature of the works in progress, the same should not be valid unless given in writing, and should be performed by the contractor subject to all the conditions of the agreement, and should not vitiate or annul the agreement, but the difference as to time or value to be computed by the architect and added to or deducted from the time and amount of the contract, and the valuation or estimate of the architect was to be accepted by both parties. Then at the end of the agreement there is another proviso that "any alterations or additions to the said works or buildings shall in no way release the contractor from this agreement." It has been argued that the respondent, by ordering extra works, prevented the work being done within the time specified, and that the work, or some of the additional work that has been ordered, was not within the meaning of the contract. I cannot agree with that view. That would be narrowing the words "any altera-

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tions or additions." I look upon the works afterwards done as being auxiliary to the building of the house, to make it in fact more convenient. It is said that those works were not ordered in writing, but the contractor accepted the order and acted upon it, and I therefore think that he waived any objection that he might have taken that it was not in writing. Furthermore, in his action he has sued upon those works, and in his particulars says, "To original contract, £525; extras, so much," making up the price. That being so, I do not think he can object that the order was not given in writing. It has been said that the contractor was prevented carrying out the work by the defendant. I think this case is altogether different from the case of *Holme* v. *Guppy*. The contractors in that case undertook to do certain works within four months and a half, but they did not begin the work for four weeks after the date of the agreement, in consequence of the defendants not being able to give them possession. Therefore there was a clear prevention from doing the work by the action of the employer. I am not prepared to say that there was anything harsh in this contract. I think it is desirable that contractors should understand that penalties may be enforced, because I have a strong impression that these penalties are sometimes treated by contractors as if they were only a form. In this case the Magistrate went into the facts, and he found that a reasonable time allowance had been made, and, therefore, I cannot think that there has been any injustice to the appellant. I am of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Barker & Boultbee.*
Solicitors for respondent: *Moss & Barsden.*

JOHNSON, PLAINTIFF (APPELLANT).
NORSEMAN GOLD MINES, LIMITED, DEFENDANTS (RESPONDENTS).

1901.
Oct. 2.

The C. J.
Hensman, J.

Findings of jury—Inconsistency—Mines Regulation Act, 1895—"*Mine*"—"*Machinery*"—*Contributory negligence.*

This was an appeal from the judgment of Pennefather, J., upon the findings of a jury, and in the alternative a motion for a new trial, upon the ground that the findings of the jury were inconsistent and contradictory.

The plaintiff was a servant of the defendant Company, and in the course of his employment he was directed by the Company's manager to remove some galvanised iron from a structure which formed a screen or covering for a large tailings wheel. While thus engaged, one of the battens upon which he stood

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gave way, and he fell a distance of forty feet, sustaining severe injuries, for which he claimed damages. It was admitted by the plaintiff at the trial that he knew the structure to be of a flimsy character. The jury made the following findings: 1. That the accident was caused by reason of the faulty construction of the shed. 2. That the shed was originally properly constructed for the purpose for which it was intended. 3. That although the shed was nailed or fixed to uprights, there was no negligence in so constructing it. 4. That there was no negligence on the manager's part in not discovering that the batten on which the plaintiff stood was split. 5. That the plaintiff did not use reasonable precautions to ascertain that the structure was safe for him 6. That the plaintiff could, by the exercise of ordinary care, have ascertained that the batten in question was not safe, and 7, That the plaintiff was guilty of contributory negligence. The jury were asked by the Judge, after they had given these findings, "What damages do you give the plaintiff?" to which they replied, "We find for the defendants." Upon these findings the Judge entered judgment for the defendant Company.

Held, that the Judge rightly entered judgment for the defendant Company and that a new trial should not be granted.

Harney, for appellant. The findings of the jury are inconsistent. The real question for the jury was, "Was the shed unsafe for the purpose for which the plaintiff was told to use it?" viz.:—as a scaffolding to stand upon while removing the iron. That was the real question, and the other questions put were irrelevant, and the issue was incorrectly left to the jury. The jury found contributory negligence, but, though that was a complete answer at Common Law, it did not avail under the Mines Regulations Act, 1895.

James, for the respondents. The questions put to the jury were framed by counsel on both sides, and the learned Judge and the appellant must be controlled by the manner in which the case was conducted in the Court below, and the issues placed by arrangement before the jury. The contention that the findings were irrelevant was met by the question and answer, "What damages do you award the plaintiff?"—"We find a verdict for the defendants." The plaintiff was not at work upon a "mine" within the meaning of the Mines Regulations Act, as he was simply dismantling a disused structure. Neither did the shed and wheel come under the definition of the term "machinery" in that Act, and, therefore, the defendant was thrown upon the Common Law, which does not hold an employer liable for the defective state of the premises, but only imposes the duty of finding proper tools and appliances. See *Thomson* v. *City Glass Bottling Co.* (*a*). The structure was reasonably fit for the purpose for which it was intended, viz., as

(*a*) 71 L.J.K.B., 145.

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a screen for the wind. Under the Mines Regulations Act and the Employers Liability Act, notice must be given to the defendant. That notice had not been given, and, therefore, on that ground the appeal must fail.

Harney, in reply.

STONE, C. J. I am of opinion that this appeal should be dismissed. The application would probably never have been made to us but for the somewhat exceptional and peculiar questions that the jury were asked to answer at the conclusion of the evidence in the case. But I think, after a careful consideration of the evidence and the findings of the jury upon those questions, there can be no doubt as to what they meant, and although at first sight some of the findings may appear to conflict with others, still, they are capable of being reconciled. The grounds of this appeal are set forth in the notice of motion, and the plaintiff, therefore, is limited to the grounds that he has set forth, and if this be so, certainly he is not entitled to reverse the findings of the jury upon those grounds. An effort has been made to introduce objections that were not taken in the Court below, and that do not appear upon the notice of motion. But even those objections, I think, would not hold good in this case. The plaintiff was a servant engaged for the defendant Company in a mine, and in the course of his employment, he appears to have been directed to go and dismantle certain covering off a big wheel. He required assistance to be given him in connection with that work, and that assistance was supplied, and he proceeded to carry out his duty. The jury have found that that particular covering that the plaintiff was to dismantle was constructed in a proper way for the purpose for which it was required. It appears that that purpose did not require a very substantial structure. It was made of light battens nailed to uprights and covered with iron. In the course of dismantling, the plaintiff became aware of the nature of the structure, and in his evidence admits that the battens were only nailed and that the structure was of a flimsy character. He says, "It looked like flimsy work," and afterwards he says, "It was a flimsy structure, the iron was nailed on the outside, I saw the structure was strong enough to carry the iron." He commenced dismantling at the bottom of this structure, and proceeded to uncover it. That mode of procedure weakened the structure, because the iron had the

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effect of tying it somewhat together, and when he came to the top of the structure and desired to take off some of the iron right on top, he had loosened the iron from below the rafter that carried the top roof, and then proceeded to get on the top, and the batten having no support whatever underneath, and being of a frail nature, the jury have found that there was no reason at all why he should have gone on the top of the structure to remove the iron. The man that was working with him did not think it necessary, and removed the iron by a process that he employed underneath, but his comrade, apparently risking the strength of the structure (I do not suppose for a moment he would have got on if he thought it was going through with him), ran the risk and went up, and this batten which was only nailed, it appears, had a crack in it caused by the nail when it was first put up, and the lower piece of iron, that had hitherto tended to support it, being removed, and the extra weight of the man coming on top of it, was too severe a strain, and the result was the batten broke and the man fell. So that upon the merits of this case the plaintiff clearly had only himself to blame, and I am rather inclined to agree with what Mr. James said—that if the verdict had been the other way he would have had good ground for applying for a new trial upon the ground that the verdict was against the weight of evidence. However, legal points have been raised, and it is urged that there was neglect on the part of the manager of this mine in that he had directed the plaintiff to go upon this flimsy structure to take the iron off. It is true that he did direct him to go up on this flimsy structure, but he gave no directions as to the way in which he was to take this iron off, and he had a right to presume that this man would exercise his common sense, and would take off the iron in a way that would suggest itself to him when he found the nature of the structure upon which he was engaged. The man ascertained, after he had taken off some of the iron, that this was a flimsy structure, and a structure, therefore, on which he should have worked carefully, and he ought to have known that there was no occasion for him to test the strength of that batten on the top by going on the top of it. I cannot see what breach of duty the manager was guilty of in directing this man to take down a structure which the man knew was of a flimsy character. The duty was cast upon the man of going carefully to work. If one has a temporary shed in one's premises and employs a servant to go and take it down, and that

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servant knows it is of a flimsy character, he must take extra precautions, and not throw himself into danger. Then, again, in regard to the point taken that this structure was machinery within the meaning of the Mines Regulations Act, if this particular wheel had been in use at the time, I am inclined to think that the shelter which was constructed over it for the purpose of forcing the water into a certain direction might have been taken as part of machinery, but the question does not arise in this case, because this particular wheel at the time the shelter was being removed was not being used. It was discarded machinery and of no use, and the shelter, in consequence, was going to be removed from it. The case referred to by Mr. James of *Thompson* v. *City Glass Bottling Co.*, appears to be somewhat in point. As I threw out in the course of Mr. Harney's argument, it would be absurd to contend that discarded machinery, because it happens to be left on the mine, is to be kept in good order, and that the manager would be responsible under the Mines Act if one of the workmen, in removing that machinery, met with some accident. Upon that point, too, I am of opinion that the appellant fails, because the structure in question was not being used within the meaning of the Mines Regulations Act. I should not have dealt with that point but for the fact that the jury, in the course of their findings, found that the plaintiff had been guilty of contributory negligence. That is an answer to an action at Common Law for negligence, and also for an action under the Employers Liability Act. The plaintiff, therefore, would be thrown back upon his right to recover under the Mines Regulations Act. Although, in the consideration of his right to recover, one has to deal to a certain extent with the liabilities of employers under the Common Law, because under the Mines Act the action being brought for negligence as well as for breach of the Statutory provisions of the Act, I am of opinion that there was no Statutory breach of the Act. Nor has the plaintiff proved that the defendant Company were guilty of any negligence, and, therefore, the finding of the jury of contributory negligence is alone a complete answer to the plaintiff's action. Had there been a breach of the Statutory provisions of the Act, then that finding would not have been a defence to the action, but simply a matter for the jury to take into consideration when they came to estimate the damages.

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HENSMAN, J. I am of the same opinion. This is an action for negligence, and the plaintiff relies to a certain extent—in fact principally—upon Section 37 of the Mines Regulations Act. (Reads section). The meaning of that section is this:—that if there is any negligence, whether it be negligence at Common Law or Statutory negligence, in either case contributory negligence is not a defence, but may be taken in consideration by the jury in assessing the damages. It is to be borne in mind that this motion does not allege any misdirection by the learned Judge to the jury. He, therefore, properly told the jury the law relating to the case. Again, none of the findings of the jury have been questioned as being against the weight of evidence. They stand unchallenged, and must be, therefore, accepted as correct. Do those findings shew any negligence on the part of the defendants? Although there may be an apparent inconsistency between two or three of them, yet there is no finding of any negligence—I am speaking of negligence apart from a violation of the Statutory provisions. The jury found that this shed was originally properly constructed for the purpose for which it was intended. They further found that there was no negligence in the manager not discovering that the rafter in question was split; also that the plaintiff did not use reasonable precautions to ascertain whether the structure was safe for him at the time. They also found that he could, by the exercise of ordinary care, have ascertained that the beam on which he stood was not safe at the time, and that he was guilty of contributory negligence. Now we come down to another point. It appears that the jury were asked by the learned Judge after they had answered all these questions, "What damages do you give the plaintiff?" and they said in reply, "We find for the defendant." If they found for the defendant without misdirection, and their finding is not objected to as being against the weight of evidence, what reason is there why judgment should not be entered for the defendant? I come to the conclusion that there was no negligence at Common Law, nor any breach of the provisions of the Act. The word "machinery" in the Act does not include such a structure as this was at the time of the accident. It had been machinery, but it had ceased to be so, and was being pulled down. I think the meaning of the section is that so long as the machinery is being used it should be kept in good order, but it would be unreasonable to hold that after it has been done with it should be

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kept in good order. Where you tell a man to pull down something, and the man, knowing it to be flimsy and unsafe, chooses to go and hurt himself, it would be unreasonable to make the employer liable. I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Parker & Parker.*

Solicitors for respondents: *Harney & Harney.*

1901.

Oct. 3.

The C. J.
Hensman, J.

EDWARD SCOTT (COMPLAINANT), APPELLANT.

PIETRO CERUTI (DEFENDANT), RESPONDENT.

Justices—Case stated—23 Vic., No. 3, Sec. 1—Preliminary objection.

This was a case stated by the Justices at Cue, pursuant to 23 Victoria, No. 3.

Counsel for the respondent raised the preliminary objection that the appellant had not complied with the duty cast upon him by Section 1 of the Act 23 Vic., No. 3 of transmitting the case to the Court within three days after he had received it from the Magistrate.

Held, that the case must be struck out.

James, for the respondent. The appellant received the case at Perth on the 3rd July about mid-day. A mail was made up at six o'clock on the morning of the 4th for Cue, so that the appellant had some five hours at least in which to have had copies typed and despatched, but he did not post it until the 5th, and it was received on the 6th, so that he did not act with the utmost promptness in doing what he did.

Harney, for the appellant. The appellant has done all that was physically possible for him to do. He posted the notice to the defendant in a registered letter within three days of its receipt by his agent in Perth, and by the "Acts Interpretation Act" such postage is deemed good and sufficient service. If the appellant's contention is correct, it would exclude from the operation of the Act all remote districts. The appellant should not be shut out and deprived of his right of appeal by the fact that there exists the physical impossibility of travelling a certain distance within a certain time.

STONE, C.J. No doubt many cases of hardship occur in the enforcement of this rule with regard to the transmission of a case

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stated and the giving of notice of the case, with a copy, to the respondent, but still we are not here to deal with such cases of hardship but to deal with the law as we find it and as it has been interpreted by recognised authority. It is clear from the authorities that it is a condition precedent to the right of the appellant to have a case heard that he should within three days of receiving the case transmit it to the Court to be filed, and that prior to doing that he should give notice, with a copy of the case, to the respondent. That rule is relaxed in cases where it is impossible for the appellant to comply with the requirements of the Statute, and if we find that he has done everything that he possibly could do to keep within the requirements of the Statute, the Court might be in a position to relieve him. But in this case, I cannot see any circumstances to justify the Court in interfering with the original rule. The parties appear to have resided at Cue, a considerable distance from Perth. There the case was heard and afterwards the appellant applied to the Magistrate for a case to be stated. The Magistrate stated a case, and how they came to send it on to the agent of the appellant in Perth, instead of giving it to the appellant himself at Cue, does not appear. Under the circumstances, the proper course for the appellant to have adopted would have been to have applied and got the case in Cue, and then to have made a copy of it and given his notice, with a copy of the case, to the respondent, and after that to send it on to his agent to file, not to send it to his agent first and require the agent to send it back this long distance to be served, but to have done all in his power to keep himself within the three days by getting the case where the application was heard and serving it there. Now he did send it on to his agent and his agent received it on the 3rd July but did not post the notice and the copy of the case until the 5th of July. Had the notice been posted within a reasonable time of its receipt, although it might not have reached the respondent in time, still, I think, the Court might under those circumstances have held that the defendant had done all that he reasonably could under the circumstances, but I cannot come to that conclusion in the face of what occurred in this particular case, and therefore I think the appellant has put himself out of Court. I should like to add in reference to this appeal what I think is the proper course for parties to adopt in these cases, where they are going to take exception to the case upon the ground that the requirements of the Statute have not been complied with, and that

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is that they should give notice of their intention to move that the case be struck out upon the grounds mentioned in the notice. That would give the other side an opportunity to come prepared to meet the motion, and affidavits would be produced, and the Court would have exactly the facts of the case before it and know how to deal with it instead of having statements made by counsel on one side and different statements made by the other. I believe the practice in England was for application to be made for a rule to strike out the case, but since rules have been abolished it is done by way of notice of motion. I think, therefore, under the circumstances the case should be struck out.

HENSMAN, J. I am also of opinion that the case should be struck out. If we were now considering for the first time the meaning of this section I should not agree with the construction that has been put upon the latter part of it by some of the Courts in England. With regard to the first part that the appellant may apply in writing within three weeks after the determination, that may well be a condition precedent ; but when the section goes on to say that the appellant should do so and so afterwards, I should myself have thought that that was merely directory. However we must take the law as we find it laid down by the authorities. I agree that here the facts are against the appellant. He has therefore lost his right of appeal. Now cases like this appear to me to bring some discredit upon the law. This Act is to give people who are convicted by Justices (who are not lawyers) a right of appeal to this Court on matters of law. If, however, they or their agent or solicitor commit some slight mistake in respect to time, the right of appeal is taken away from them. I think that is wrong. I fully agree with what was said by the late Lord Justice Bowen that Courts of Justice exist for the purpose of doing justice between parties and not for carrying out hard and fast rules. If there is some honest mistake in respect of compliance with the requirement of a Statute in a matter of this kind it might well be met by ordering costs to be paid. That would generally meet the difficulty. There is no danger of appellants putting themselves willingly out of Court. By some slight mistake on the part it may be of themselves, or of a lawyer's clerk, people living in remote parts of this large country are deprived of their right of appeal. I hope that some legal member of the Legislature will endeavour to remedy

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this state of things. Acts are sometimes adopted here from England without due regard to the different circumstances prevailing in this State. England is comparatively a small place, it is covered with railways and full of lawyers and their agents. Here we have immense distances and litigants are often cut off from any legal assistance. Only three days are given after the appellant receives the case from the Magistrate to deliver it to the Court, first giving notice to the respondent who may, at that time, be hundreds of miles away. I think that the Statute should be made more elastic, and that discretion should be given to the Court to extend the time, upon such terms as justice may require.

Case struck out.

Solicitors for appellant: *Harney & Harney.*

Solicitor for respondent: *W. F. Forster.*

1901.

Oct. 3.

TAYLOR, INFORMANT (RESPONDENT).

THOMPSON AND OTHERS, DEFENDANTS (APPELLANTS).

The C. J. *Hensman*, J.

Justices—Case stated—23 Vic., No. 3—Municipal Institutions Act, 1900—*Bye-laws—Plying for passengers.*

This was a case stated by Justices at Fremantle, pursuant to 23 Vic., No. 3. The four appellants had been convicted and fined for unlawfully plying for passengers, contrary to the Municipal Institutions Act, 1900. Against this conviction they now appealed. It appeared that the defendants were drivers of "stage carriages," licensed under the the bye-laws of the Fremantle Municipal Council to carry passengers along certain fixed routes. On the date of the offence they had (in pursuance of a contract previously entered into with the West Australian Government) abandoned the route and conveyed certain immigrant girls from the wharf to the Depôt.

On Appeal.

Held, that the conviction must be quashed.

Barker, for the appellants, contended that they had not "plied for passengers" within the meaning of the bye-laws, and that they were merely carrying out a contract made beforehand.

Gawler, for the respondent. The words "plying for passengers" must be read as widely as possible, and should be interpreted as "plying for hire." This liberal interpretation is necessary in the public interest, so that passengers may not be inconvienced by the withdrawal of vehicles from the route. The defendants, in carrying the immigrants and receiving payment, undoubtedly "plied for hire."

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HENSMAN, J. delivered the following judgment of the Court. We think that this is a clear case. Mr. Gawler has said all that can be said in support of the conviction. We think that the Magistrate was in error in reading the bye-law in the way he did. The bye-law says: "That no stage carriage shall ply for passengers elsewhere then on some station duly appointed." That is a reasonable provision that the drivers of stage carriages should either be on the station, waiting for hire, or proceeding along their route; and that they should not ply for passengers elsewhere. In the present case a special contract had been made with the Government to convey some immigrants from a ship in the harbour. That contract was performed by these drivers, who previously took off their vehicles the badges or marks of their being stage coaches, so as to shew that they were not then employed as stage coaches, and who went to the harbour and carried these immigrants to a certain place. The Magistrate's desire that the public should not be inconvenienced is most laudable, but there was no offence here against the bye-law. We are of opinion that the Magistrate was not right in point of law in convicting on these facts, and that the conviction must be quashed.

Appeal allowed. Conviction quashed.

Solicitors for appellants: *Barker & Boultbee.*

Solicitors for respondent: *Kidson & Gawler.*

MATTHEW GOODE & CO., DEFENDANTS (APPELLANTS.)

W. T. MURPHY, PLAINTIFF (RESPONDENT).

1901.

Oct. 4.

The C. J.
Hensman, J.

Appeal from decision of Judge—Evidence of contract—Amendment of statement of claim.

This was an appeal from the judgment of Pennefather, J., in an action tried without a jury. The action was for the supply of certain material, which the plaintiff alleged the defendants had undertaken to supply him with for the making of khaki uniforms for the West Australian Government, and judgment was entered for the plaintiff for £100. The defence was a denial of the undertaking to supply the goods, the defendants contending that they had merely promised to do their best to procure the same.

On Appeal.

Held, that there was not sufficient evidence to shew that the Judge in the court below had come to a wrong conclusion on the facts before him in finding a contract between the plaintiff and the defendants, and that the appeal must therefore be dismissed.

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MATTHEW GOODE & CO. v. W. T. MURPHY.

Haynes, for the appellants. The Statement of Claim was amended at the trial, so as to make the date of the contract the 28th of February instead of the 22nd. The learned Judge was wrong in his judgment, because he based his decision on documents that were not in existence at the time, as alleged by the Statement of Claim, the contract was made. The plaintiff's case discloses no concluded contract. There was no contract on the part of the defendants to deliver the material within any specified time.

Harney (*Downing* with him) for the respondent. The terms of the contract were arranged on the 22nd of February, but it was conditional upon the acceptance of the tender, which was on the 28th. The learned Judge was therefore right in referring back to the 22nd to ascertain the real foundation of the contract. There was a clear understanding to supply the material in time for the plaintiff to carry out his tender.

Haynes, in reply. The learned Judge found that the contract was made on the 22nd of February, and he based his decision upon facts which occurred after that date. His finding was directly opposed to the Statement of Claim which set up a contract on the 28th.

Cur. adv. vult.

STONE, C.J. This is an appeal from a judgment of the late Mr. Acting Justice Pennefather at a trial before him without a jury. The action was one for breach of a contract alleged to have been entered into between the plaintiff and the defendant Company to the effect that the plaintiff would purchase, and the defendants would sell and deliver to him at Perth, a certain quantity of material which the plaintiff should require to enable him to fulfil a certain contract, entered into with the Government of this State, to supply and deliver to the State Government on or before the 25th March, certain military uniforms. The defendants denied the existence of such a contract, but the learned Judge, after hearing the evidence, found for the plaintiff. Now it is alleged that the learned Judge was wrong in coming to such conclusion. After carefully listening to the arguments of counsel upon this point, and considering the evidence that was before the Judge, I cannot come to the conclusion that the learned Judge was wrong upon the facts before him. It appears that the Government were calling for

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tenders for certain uniforms, and Mr. Bridger, the manager of the defendant Company, appears to have been anxious that his principals should have obtained the supplying of the material required for those uniforms, and with that object in view approached some of the tenderers. The first tenderer approached was the Swan Clothing Factory, but before approaching the tenderers, Mr. Bridger, the manager, placed himself in communication with some of the supply depôts in the other States and obtained certain information from them with regard to the supply of the particular material that would be required. Failing to induce the Swan Clothing Company to tender, Mr. Bridger approached the plaintiff, Mr. Murphy, and it is important to notice that Mr. Murphy was not at all anxious himself to tender or to obtain any contract in connection with the supply of these uniforms, but was induced to do so by the defendant Company's manager, Mr. Bridger. The time for tendering was about to expire, and on the day that the tendering closed, Mr. Bridger waited on the plaintiff—that was on the 22nd February about half-past twelve, and the tenders closed at half-past two on that day—and, according to the plaintiff's evidence, asked him if he would put in a tender. The plaintiff said he had not made up his mind to do so. Thereupon Mr. Bridger said if he did tender his Company would supply him with the goods, and also the deposit and money to carry out the contract. The plaintiff, knowing the difficulty there would be in getting the material over in time to enable him to complete the contract within the time required by the tender, pointed this out to Mr. Bridger and asked him if he was sure he could get the material over in time. There is no statement on the notes as to whether Bridger replied to that question or not, but however, Bridger got the tender and filled it up for the plaintiff to sign. Having got the tender, he of course became acquainted with its contents, and he knew that that tender required that the uniforms should be supplied by the date mentioned in the tender, which was, I think, the 30th March. If, therefore, this plaintiff's statement is correct, that Bridger when he spoke to him about tendering said, "If you agree to tender, my Company will supply you with goods to carry out the contract," I think it is evident that the meaning of that expression was that he would supply the goods so that the plaintiff could carry out his contract by the 30th March, and that it would be no use his supplying the goods after the 30th of March if he intended that the plaintiff was to carry out his

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contract as disclosed in the tender. Therefore, on that conversation alone and that conduct on the part of Mr. Bridger, I think there was ample evidence upon which the learned Judge could come to the conclusion that there was a concluded contract on the part of the defendant Company, by their manager, to supply this material to the plaintiff for the purpose of enabling him to complete these uniforms and comply with the terms of the tender that he (Mr. Bridger) filled up for the plaintiff to sign and which the plaintiff signed. It is true that subsequently an alteration was made in the date of the tender, and the time was reduced, but it appears from Mr. Bridger's own evidence that the plaintiff, before he arranged that alteration, consulted him (Bridger) and that Mr. Bridger, although he mentioned that the time was rather short, concurred in the alteration. It is therefore not open to him now to make any objection to the terms of the contract on the ground that it was altered without his knowledge or consent. At the trial an amendment appears to have been applied for and allowed with regard to the date on which the contract was entered into. In the Statement of Claim the contract was alleged to have been entered into on the 22nd of February. The date was subsequently altered at the instance of the plaintiff's counsel to the 28th February, and that alteration appears to have been brought about in consequence of evidence given by the plaintiff with regard to what occurred subsequently to what I think was a binding contract on the part of the defendant Company to supply the goods within the time mentioned. It appears that the tender was accepted on the 28th of February, and the plaintiff went to Mr. Bridger immediately afterwards and acquainted him of the fact, and he was then asked how much material he would require. He mentioned the quantity and Mr. Bridger said "Very well." He then wrote out a telegram to the Ballarat Woollen Mills asking for a certain quantity to be sent over. That was the telegram of the 28th February. The plaintiff says that at that interview Bridger said he would deliver the whole of the material within two weeks from the date of the order, and it would appear that in consequence of that statement an alteration was made in the Statement of Claim. I am of opinion that the Statement as first drawn was the more correct, and that it would have been better to have left the contract as of the 22nd February instead of the 28th, and that the learned Judge was right in coming to the conclusion that the contract was concluded on that date. If

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any evidence was required to shew that the learned Judge was right in coming to the conclusion that there was a contract, I think this subsequent conversation and conduct on the part of Mr. Bridger confirms that opinion, although it is true that Mr. Bridger denies in his evidence that he ever stated that he would deliver the material within two weeks from the date of the order. Well, the learned Judge had the evidence of Mr. Bridger and the plaintiff before him, and he was at liberty to judge which of the two he would believe with regard to that particular evidence. But, even supposing the learned Judge was wrong in coming to the conclusion that the contract was made on the 28th February, I do not think this Court (sitting as a Court of Appeal) would be bound to throw over the judgment and to enter judgment for the plaintiff upon such a mistake as that, if the Court sees clearly that there really was a contract between the parties about the time mentioned in the Statement of Claim. It would be quite within the province of this Court if it thought necessary, in order that the judgment should be corrected, or the facts should be corrected, to even amend the Statement of Claim and make the contract as of the 22nd of February instead of the 28th. Now, the whole conduct of the manager (Mr. Bridger) seems, in my opinion, to be consistent with the finding of the Judge, and the opinion that I have already expressed with regard to the existence of this contract, because he seems to have been more anxious than the plaintiff with regard to supply of this material from the Woollen Mills or Factories in the other States in time to enable the plaintiff to complete his contract. All those telegrams that were sent were sent in his name, and he shews upon the face of them his anxiety that the goods should be delivered as quickly as possible, and even before the tender was accepted, when he interviewed Mr. Pether (I think it was) or Mr. Sparks and Mr. Benbow, there again he seems to have shewn an anxiety that the plaintiff should obtain this contract, because when the Government Storekeeper was particular as to whether the goods would be supplied in time, according to Mr. Spark's evidence, Mr. Bridger replied that he would be able to get the material and his Company would do all in their power to get it. The Government Storekeeper (when the plaintiff called upon him with regard to the supply of the material) was not satisfied with his assurance, and indeed, the plaintiff appears to have preferred that he should communicate on that matter with the defendant's manager,

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Mr. Bridger, and it was in consequence of what the plaintiff said that Mr. Bridger called and saw the Government Storekeeper and made use of the expression that I have just mentioned, namely, that he would be able to get the material and would do all in their power to get it. I do not think it necessary to go in detail into the various telegrams that were sent by Mr. Bridger to those factories that were in treaty with him with regard to the supply of material, because I have come to the conclusion, after reading those telegrams that they to my mind shew that the plaintiff's story was the more correct one, that Mr. Bridger had consented to supply this material in order that the plaintiff might be able to complete his contract. There is no express evidence at all upon the defendant's side that there was any conversation by Mr. Bridger with the plaintiff to the effect that he would supply as much material as he could obtain, or that he would obtain material to enable him to complete the contract. If there was such evidence, even then I think it would be a matter for the consideration of the Judge, where the plaintiff had sworn to the contrary, to say which side he believed. But, on the other hand, we have against that, and in the absence of any express evidence by Mr. Bridger that he only agreed to do his best to supply the material, we have the direct and positive testimony of the plaintifl that Mr. Bridger asked him to tender, knew what the tender contained, filled it up for him, and said that he would supply the goods to enable him to complete that contract. In those circumstances I think that the appeal should be dismissed.

HENSMAN J. This is an appeal from the decision of a Judge sitting without a jury, and the rule on which the Court acts in such cases is not to interfere with the decision of the Judge unless it be shewn that he is clearly wrong. It is to be borne in mind that the Judge at the trial sees the witnesses, observes their demeanour, and so on, and the Court is very loth to interfere with his decision on any question that depends upon the credibility of the verbal evidence. In the present case the evidence of the plaintiff was that the Government had invited tenders for the supply of certain clothing by the 30th March; that the defendant's manager called upon the plaintiff and asked him whether he was going to tender. That the manager then induced him to tender by saying to him: "If you agree to tender we will supply you with the material." The manager then filled up the tender form which was sent to the

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Government. Now the question arises whether, assuming that the Judge believed what the plaintiff said, is there evidence upon which the Judge could imply an agreement by the defendant to deliver the material within sufficient time to enable the plaintiff to fulfil his contract? After listening to the able argument of the counsel for the defendant, I will not say that I have arrived at a decision without any doubt; but, on the whole, I have come to the conclusion that there was sufficient evidence to enable the Judge to find that there was such an agreement. The manager well knew that he was persuading the plaintiff to tender upon a promise that he would supply him with the material, and he knew that that material, in order that the contract might be fulfilled, must be supplied within a certain time. Under these circumstances I consider it a fair deduction to make that the contract was to supply the material within the time which would enable the plaintiff to fulfil his tender, and I agree that the contract was in effect made on the 22nd. No doubt a condition had to be performed before it could take effect. On the 28th the plaintiff had a verbal acceptance of his tender, and the contract was then complete, or rather the condition was fulfilled which was precedent to the contract coming into force. I do not think it has been shewn that the learned Judge was wrong, and, therefore, I am of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *A. F. Abbott.*

Solicitors for respondent: *Ewing & Downing.*

HOP LEE, PLAINTIFF (APPELLANT).

MILL, DEFENDANT (RESPONDENT).

1901.

Oct. 7.

Local Court—Payment into Court—Admission of liability—Non-suit.

The C. J. *Hensman*, J.

This was an appeal from a judgment of the Magistrate of the Local Court, Perth. The action was for the recovery of £30 damages for the trespass of the defendant's cattle on the plaintiff's garden at Leederville. The defendant had paid into Court the sum of £5, in full satisfaction of the plaintiff's claim, which the plaintiff refused to accept. At the hearing, on the close of the plaintiff's case, the defendant moved for a non-suit on the ground that the plaintiff was not entitled to recover as his land was not sufficiently fenced, and cited Sections 20 and 30 of 46 Vic., No. 7. The Magistrate refused to non-suit at this stage of the case, but at the close of the defendant's case he non-suited the plaintiff with costs.

A. F. Abbot, for the appellant.

Durston, for the respondent.

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It was admitted by the parties, for the purposes of the appeal (1) That the alleged trespass had taken place. (2) That the £5 had been paid into Court, and that there was no means, under the Local Court Act, of paying money into Court without admitting liability. And (3) That the fence in question was bad and was not a sufficient fence for resisting great stock within the meaning of 46 Vic., No. 7.

On appeal.

Held, that inasmuch as the defendant had admitted the trespass, and paid the £5 into Court without any reservation, the Magistrate was wrong in non-suiting, as the only question before him was that of assessing damages.

Appeal allowed and case ordered to be re-heard.

Solicitor for appellant : *A. F. Abbott.*

Solicitors for respondent : *Speed & Durston.*

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THE

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1901-2.

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JUDGES & LAW OFFICERS

OF THE

Supreme Court of Western Australia.

(1901-2.)

Chief Justice:

SIR EDWARD ALBERT STONE, K.B.

Puisne Judges:

ALFRED PEACH HENSMAN, ESQ.

STEPHEN HENRY PARKER, ESQ.

FREDERICK WILLIAM MOORHEAD, ESQ.

Attorney General:

GEORGE LEAKE, ESQ., K.C.

Master of the Court:

FRANCIS ARNOLD MOSELEY, ESQ.

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CASES

DETERMINED BY THE

FULL COURT OF WESTERN AUSTRALIA.

DINHAM, APPLICANT.
HUNGERFORD, RESPONDENT.

1901.
Oct. 7.

The C. J.
Hensman J.

Mandamus—Transfer of license—The Wines, Beer and Spirit Sale Act, 1880, 44 *Vic. No.* 9, *Sec.* 34.

A rule *nisi* was obtained for a Writ of Mandamus to command the respondent, the Resident Magistrate at Busselton, to sign a transfer of the license of the Busselton Hotel, Busselton, from H. F. Gomme to the applicant, under Section 34 of the Wines, Beer and Spirit Sale Act, 1880. This section gives the Magistrate a discretion in granting an application for a transfer. On the return of the rule *nisi*—

Held, that the Magistrate should not exercise this discretion without hearing some evidence.

Leake, K.C., shewed cause. The Magistrate has come to a decision and exercised his discretion. It is not for the Court to say whether he was right or wrong. The affidavits disclosed the fact that the applicant was a married woman living apart from her husband. Where the Magistrates have exercised their discretion it is a cardinal rule that, however erroneously they have decided, the Court cannot over-ride their decision. *Regina* v. *Middlesex Licensing Committee, ex parte Lindsay* (*a*).

Alcock, in support of the rule. To entitle the Magistrate to refuse to transfer it must be shewn that the applicant is of bad fame. Here the applicant was only shewn to be living apart from her husband, who was in a lunatic asylum.

(*a*) 42 J.P., 469.

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STONE, C. J. We do not think the mandamus should go in the form applied for, but we think it should be by way of an order to re-hear the case. It would appear that the Magistrate had no evidence before him upon which he might act in exercising his discretion. Under the 34th Section, although the Magistrate may disallow the application, should he not approve of the person applying, still, the section reads that he should only exercise that discretion after having heard some evidence. As far as the facts brought before us go, no evidence at all appears to have been brought before the Magistrate, and he, of his own motion, rejected the application without giving any reason for such rejection. If the ground upon which he refused was that the applicant was living apart from her husband, that is not a valid ground for rejection. If he did decide on that ground he was wrong. He should have some evidence before him as to the character of the person who is applying, and if he has that evidence the Court will not interfere with his discretion.

HENSMAN, J. I am of the same opinion. The discretion given to Magistrates under this Act is within certain limits. The 24th Section says it shall be the privilege of ratepayers to object to the granting or transfer of licenses, upon certain grounds; some relating to the parties applying, and others relating to the premises. I am of opinion that, although it is open for Justices of the Peace to refuse a license, or transfer of a license, yet it must not be on arbitrary grounds of their own; it must be on one or more of the grounds mentioned in the section. In the present case there was no evidence of any legal objection to this license being endorsed. The case must go back in order that the Magistrate may, with the knowledge now presented to him by the Court, give his decision. He ought to transfer the license unless some valid objection is proved before him.

Rule absolute for a mandamus to compel the respondent to re-hear the case.

Solicitor for applicant: *F. M. Alcock.*

Solicitors for respondent: *G. Leake & Co.*

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LITTLE, PLAINTIFF (APPELLANT).

WELSH, DEFENDANT (RESPONDENT).

1901.

Nov. 25.

The C. J.
Hensman, J.

Entry of appeal—Order 54, Rule 8—Notice of motion—"Or so soon thereafter as counsel can be heard"—Construction of English rules of practice.

It is not a valid objection to an appeal that the appellant has given his Notice of Appeal for a day on which the Full Court does not sit, provided he has set the appeal down for a day on which the Court is likely to sit, although it may be after the day named in his Notice of Appeal.

This was a motion to rescind an order made by Parker, J., in Chambers.

Forster, for the respondent, raised the preliminary objection that the appeal was out of time, not having heen entered before the day named in the notice of motion for hearing the appeal. The notice of motion was dated the 25th October; the day named for hearing was the 29th October, and the day of setting the appeal down was the 9th November. *Re National Assurance Co.* (*a*), *In re Mansell, Rhodes* v. *Jenkins* (*b*). Rule 8 of Order 54, and the "Annual Practice, 1901," under heading of "time for entry."

Pilkington, for the appellant. Notice was given and the appeal entered prior to the first possible day on which the appeal could take place, viz., prior to the 19th November, the date of commencement of the present sittings. The form of the notice was that the Court would be moved on the 29th October, "or so soon thereafter as counsel can be heard," and the first possible day upon which counsel could be heard was the 19th November. The appellant had completed everything necessary for the hearing of the appeal a considerable time before the appeal could possibly come on for hearing. *In re Coulton, Hamling* v. *Elliott* (*c*).

Forster, in reply.

STONE, C.J. In construing our Rules we must not be guided altogether by the decisions of the English Courts, but we must look at the different circumstances under which the Court sits here to what it does in England to which those decisions apply. There the Court sits continuously, whereas here we only sit every second month. The parties under these circumstances must frame their notices accordingly. In this case it appears that the appellant gave notice of his appeal for a day on which the Court did not sit, but he

(*a*) 4 Ch. D., 305. (*b*) 7 Ch. D., 711.
(*c*) 34 Ch. D., 22.

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entered his appeal for a day on which the Court was likely to sit, but after the day named in his appeal. So long as the Court was not sitting on the day for which he gave notice, and he set the case down for a day on which the Court was likely to sit, I think that he has substantially complied with the Rule referred to. It would be as well, I think, that the parties should if possible, in giving their notice of appeal, give a somewhat similar notice to those given in England, and then they could enter their appeals in a similar way. It was a mistake, no doubt, to enter this appeal for a day on which the parties knew the Court would not be sitting, that is the 29th October. On the other hand it is possible that they may not have been quite certain of their ground, because the Court sits spasmodically, as it were, during the month—we adjourn sometimes from day to day, and sometimes a week, and meet again—and it may be that the parties thought there was a chance of the Court sitting about that time. However, I think it is as well to follow as closely as possible the practice at home, because after all it is a matter of practice, and, therefore, we should endeavour to carry out the practice of the English Courts as far as possible, bearing in mind the different circumstances under which we sit in this State.

HENSMAN, J. I am of the same opinion. As the Chief Justice has said, we must endeavour to construe these Rules, not according to the practice in England, but according to the circumstances here. In other words we must endeavour to make these Rules our servants and not our masters. The point in the English cases is that the appeal must be set down or entered before the day named for hearing. Here it is often somewhat doubtful when the Court will sit. In the present case the date named for hearing was October 29th, "or so soon thereafter as counsel can be heard." It was rather a sign of the appellant not wishing to abandom his appeal, but desiring to push it on, that he should have given notice for a too early day. If he had given notice for an early day and had not set the appeal down it would be right to assume that he had abandoned it, but that was not the case here.

Appeal ordered to proceed.

Solicitors for appellant: *James & Darbyshire.*

Solicitor for respondent: *W. T. Forster.*

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LITTLE, PLAINTIFF (APPELLANT).

WELSH, DEFENDANT (RESPONDENT).

1901.

Nov. 25.

The C.J.
Hensman, J.

Specific performance—Interim injunction—Application to extend injunction—"Prima facie" case.

This was a motion to rescind an order of Parker, J., made in Chambers, by which he dissolved an interim injunction which he had previously granted.

The plaintiff's claim was for specific performance of an agreement entitling him to a transfer from the defendant of a two-thirds share in certain quartz claims. An interim injunction was obtained by the plaintiff *ex parte*, restraining the defendant from transferring or assigning any portion of the property, but on the application to extend the injunction, the Judge in Chambers refused, on the affidavits filed, to make the order asked for, on the ground that the plaintiff had not established a *prima facie* case.

On Appeal.

Held, that the Judge was right in refusing to extend the injunction.

James, for the appellant. The question at issue was whether the point of time had arrived when the plaintiff was entitled to a transfer. On that question there was a dispute, and, pending the settlement of that dispute, the plaintiff was entitled to be protected by an interlocutory injunction. See "Kerr on Injunctions," p. 528, *London & County Bank* v. *Lewis* (*a*).

Forster, for the respondent. There is no allegation on the affidavits that the property is in any danger. The defendant was not yet the registered owner, and could not, therefore, transfer his share to the plaintiff.

STONE, C. J. The opinion which I am going to express with regard to this appeal will not affect any subsequent application that the plaintiff-appellant desires to make upon a fresh state of facts, but, upon the facts before the learned Judge in Chambers, I cannot but come to the conclusion that he was right in refusing an injunction. An action appears to have been commenced against the defendant for a specific performance of a certain agreement by which he was entitled, under certain circumstances, to two-third shares in some quartz claims, but the agreement was subject to the defendant being able to establish his title to those claims, and one article of the agreement was to the effect that the defendant would, upon his title to the said claims being established, at the request of the plaintiff, transfer to him the said two-third parts or shares thereof. Upon that, at the commencement of the action, the plaintiff applied to the Judge in Chambers for an injunction. He

(*a*) 21 Ch. D., 490.

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appears to have obtained an interim injunction *ex parte*, but upon the application to extend the injunction the learned Judge refused the application upon the ground that the plaintiff had not established a case. Now I think it is clear from the authorities that upon every application for an interlocutory injunction it is incumbent upon the plaintiff to prove a *prima facie* case. In this particular case the plaintiff would not of course have been bound to wait, before applying for an injunction, until the defendant had established his claim to the quartz claims, because it might so turn out that the defendant was about to prejudice the plaintiff's interests in those claims, and that if those interests were not immediately protected the plaintiff would lose his two-third shares when the defendant's claim to these quartz claims had been established. But there is no suggestion of that here. The affidavit merely asserts that the defendant was the owner of these quartz claims, and that he had reason to think that if he were not granted an injunction the defendant might prejudice his right to them. There is a further affidavit of the solicitor to the effect that he believed that if the defendant was not restrained by the order of the Court, he (the defendant) might dispose of the plaintiff's interest in these qnartz claims, but there is no foundation or suggestion for that assertion; the grounds are not set out, and there was really nothing for the learned Judge to go upon in arriving at a conclusion as to whether there was any ground for such a belief. Again, I think it was incumbent upon the plaintiff, before he was entitled to his injunction, to shew some *prima facie* right of action in respect of these two-third claims. It is true he says that the defendant is now the undisputed and registered owner, but from what the counsel (Mr. Forster) says it would appear that that assertion is not correct, and that it was admitted before the Judge in Chambers that the defendant is really not at present the undisputed and registered owner of those claims; that there is certain litigation pending, certain disputes to be settled, before he does become fully established in his right to these claims. So that we not only have an absence of a *prima facie* case to a right of action in the plaintiff, but there is also an absence of proof that there is a probability of the defendant making away with the plaintiff's shares unless he is precluded from so doing by an order of the Court. In the absence of any affidavit to the effect to which I have referrrd, I think the learned Judge was quite right in refusing to extend the injunction.

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HENSMAN, J. I am of the same opinion. With regard to the affidavits filed on the part of the plaintiff, they do not, or at all events one of them does not, comply with the Rule laid down in Order 36. (Reads Rule). Therefore an affidavit to be receivable on an interlocutory motion, where it only states belief, must be coupled with the grounds of that belief. It was not proved to the satisfaction of the Judge, nor has it been proved to my satisfaction, that there is any intention in the defendant to sell or dispose of these claims. The plaintiff in his affidavit says: "Unless the defendant is restrained from any dealing with the claims I believe I shall be put to great additional delay and expense in perfecting my title, and my interest in the profits will be altogether lost." He gives no grounds whatever for that belief. He does not suggest that Welsh has threatened to dispose of them. Again, the plaintiff's solicitor says: "I believe it is the intention of the defendant to dispose of the said quartz claims." He gives no ground for that belief, unless it be that he says the defendant declined to execute transfers; but the defendant on that point says that he replied that he thought the request was premature. The defendant goes on to state that he never said that the plaintiff was not entitled to any interest, and he further says that it was never his intention to dispose of the claims. It is said that the Judge in Chambers only read the plaintiff's affidavit. If he had read the defendant's affidavit he would have come to the conclusion, I think, that the weight of evidence was in favor of the defendant, and it must be borne in mind that it is for the plaintiff to satisfy the Court that he is entitled to the injunction. The law is put very clearly in "Kerr on Injunctions": ". . . If the intention to do the act can be shewn to exist, or if a man insists on his right or threatens to do an act . . . . there is a foundation for the exercise of the jurisdiction . . . . If a man asserts positively that it is not his intention to do a certain act . . . . or infringe a certain right . . . . the Court will not interfere." The case which has been quoted is a lengthy one, and there has not been time, during the course of the argument, to go into it fully; but it was a case where a party alleged his right to dispose of certain property, and also expressed his intention to dispose of it. The Court said that he must be restrained from doing this until a certain question in dispute had been decided. Here there is no satisfactory evidence of any intention to dispose of these claims;

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and there is, on the other hand, a positive statement on oath by the defendant that he has never had any intention of doing so.

Appeal dismissed with costs.

Solicitors for appellant: *James & Darbyshire.*

Solicitor for respondent: *W. T. Forster.*

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Nov. 19.

The C. J. Hensman, J.

CARGEEG, PLAINTIFF (APPELLANT).

HUELIN, DEFENDANT (RESPONDENT).

Local Court—Prohibition—Rules of 1897—*Rules* 123, 122, 38 *and* 26—"*Summons*"—"*Notice*"—*Computation of time—Sunday.*

A Local Court summons was taken out against the respondent to recover an alleged debt, and was returnable on Thursday, August 8th. It was served on Tuesday, July 30th. The respondent obtained a rule *nisi* calling upon the plaintiff to shew cause why a Writ of Prohibition should not issue, and on the return of the rule the Chief Justice made the same absolute. The plaintiff appealed.

Held (HENSMAN, J., dubitante), that by Rule 123 of the General Rules 1897, under the Local Court Act, 1863, a summons is included under the word "notice" used in the said rule, and that accordingly no part of Sunday can be included in the computation of the eight days required by Rule 30, between the service of the summons and the return thereof.

Robinson (*Shaw* with him), for appellant. The service is good, as Sundays are included in the computation of time as in England. In any event Rule 123 does not apply to a summons, but only to notices as regards new trials, taxations, etc.

Alcock, for respondent. A summons is a notice. Rule 123 is the only rule relating to time. The English Rule, as to service of summonses, was omitted in our Rules, and, therefore, the intention was that notices and all matters under our Act should be served as provided under Rule 123. Again, because Rule 123 is under the heading of "notices" it cannot be contended, looking at other Rules also under the heading of notices (which have absolutely no reference to notices) that such rule does not refer to summonses. The plaintiff is not entitled to sympathy, because he had been notified that if he proceeded in the summons Prohibition would be applied for.

STONE, C.J. I am sorry not to be able to see my way to depart from the order made by me in Chambers, because my sympathies are altogether with the appellant. By Rule 123 of the

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Local Court it is enacted that where any notice or thing is required by the Rules to be given or done, no part of Sunday, Christmas day, or Good Friday . . . . shall be included in the computation of such period. In my opinion eight days, inclusive of Sunday, is quite long enough notice for a person summoned to the Local Court; and, therefore, I should like to see that Rule altered. I think, however, the Rule means that in all cases where any notice is required by the Rules to be given, no part of Sunday shall be included in the computation of such period, and in all cases where anything is required, not by any particular Rule, but by these Rules, to be done, no part of Sunday shall be included in the computation of the period. Now the service of a summons is clearly a thing done under the Rules; it is something the Rules require to be done before the Magistrate can take cognisance of the action before him. There must be the service of a summons—that is something done—before the Magistrate has jurisdiction. In this case the service was not effected, that is, the thing was not done which was required by the Rules, and, therefore, the Magistrate exceeded his jurisdiction in going on with the proceedings and giving judgment in default of appearance. I have no doubt that as soon as the Attorney-General becomes aware of this difficulty that the Rule will be altered so as to include Sundays, but as the Rule now stands I can only construe it, as it appears to me, to be consistent with the wording of the Act.

HENSMAN, J. I am not prepared to say that I differ from the learned Chief Justice, but I am of opinion that it is an exceedingly doubtful case. I quite agree that eight days are quite sufficient within which to serve a summons, even if you include Sunday, because, even in proceedings in the Supreme Court, Sundays are only recognised in cases over six days. The doubt I have in regard to this case is whether the summons and the notice are not different things, that is to say, whether a summons is a notice under Rule 123. A summons by Rule 26 is in a form set forth in a schedule, and all the Rules which speak of summonses to appear to a plaint are silent as to Sunday, except Rule 38, which says that no service of any summons shall be effected on Sunday. Then we have four Rules under the heading "notices." Rule 122 says where, by these Rules, any party is required to give notice according to a form mentioned in the schedule, it shall be sufficient if the notice given complies substantially with such form. Rule 123 says that in all

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cases where any notice or thing is required by these Rules to be given or done, no part of Sunday shall be included in the computation of such period. I must say I have great doubt whether that does not mean that Sunday shall not count in computing the period of the service of what is technically a notice. However, although I am in great doubt, I do not propose to absolutely differ, but I think it would be a good thing if the Rules were altered.

Appeal dismissed.

Solicitor for appellant: *C. Baxter Cox.*

Solicitor for respondent: *F. M. Alcock.*

1901.

Nov. 20.

The C. J. *Hensman*, J.

LYNCH, INFORMANT (RESPONDENT).

SHARPE, DEFENDANT (APPELLANT).

Case stated—23 Vic., No. 3—Police Act, 1892, Secs. 49 and 69—Persons suspected of having or conveying stolen goods—Evidence to support conviction.

Case stated under 23 Vic., No. 3. The appellant was charged under Section 69 of the Police Act, 1892, with having in his possession certain bags of gold-bearing ore reasonably suspected of having been stolen or otherwise unlawfully obtained. The Magistrate convicted the appellant, being dissatisfied with his explanation of how he came by the bags of ore, and finding as a fact that they were reasonably suspected of having been stolen or otherwise unlawfully obtained. The principal ground relied upon by the appellant, in the case stated for the opinion of the Court, was that there was no evidence to support the conviction and to entitle the Magistrate to hold that the bags of ore were reasonably suspected of having been stolen or otherwise unlawfully obtained.

Held, that Section 69 of the Police Act, 1892, must be read with, and is supplemental to, Section 49 of that Act, and that the Magistrate should have been satisfied on the evidence of the prosecutor that the bags of ore might be reasonably suspected to have been stolen or otherwise unlawfully obtained before the appellant was called upon to give a satisfactory account of how he became possessed of them, and that, as there was no evidence upon which the Magistrate could find that the bags of ore were stolen or unlawfully obtained, the facts did not warrant him in deciding that the case was within the Statute, and that, therefore, the conviction must be quashed. *Rex* v. *Hahn* (*a*) followed. *Hadley* v. *Perks* (*b*) considered.

Barker, for the appellant.

The Crown Solicitor (*Burnside*), for the respondent.

STONE, C.J. This was a case stated by the Resident Magistrate at Fremantle for the opinion of this Court, pursuant to 23 Vic., No. 3. From the facts mentioned in the case it appears that the appellant was charged under the 69th Section of the Police Act, 1892, that on August 14th last, at Fremantle, he had in his

(*a*) 3 W.A.L.R., 78. (*b*) 35 L.J M.C., 177.

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possession certain goods, to wit, 12 bags of gold-bearing ore, value £500, reasonably suspected of having been stolen or otherwise unlawfully obtained. Upon that charge he was convicted by the Magistrate, upon the grounds that the Magistrate was dissatisfied with the explanation given by the appellant, as required by the 69th Section, and that he found it proved to his satisfaction that the appellant was found on the Mandurah Road, Fremantle, in possession of the goods mentioned in the information, which he was then conveying away from the Fremantle Smelting Works. He had previously left the ore at the Smelting Works, and the Magistrate found that these goods were reasonably suspected of having been stolen or otherwise unlawfully obtained, and that the appellant did not give an account to his satisfaction of how he came by the same. The Magistrate adjudicated and determined him guilty of the offence, and ordered him to be fined £10 10s. and costs, and also ordered that the goods mentioned in the information should be forfeited. Against that finding objection was taken, on the part of the appellant, upon certain grounds mentioned in the case. However, I need only refer to one of these grounds, the fourth, for that is apparently the only one upon which the appellant relies. That ground is that there was no evidence to support a conviction, and no evidence to entitle the Resident Magistrate to hold that the goods were reasonably suspected of having been stolen or otherwise unlawfully obtained. The question asked for the determination of the Court is whether, upon the statement of facts, the Magistrate came to a correct decision in point of law, and if not what should be done in the premises. With regard to the finding of fact, the Magistrate of course is, in fact all Magistrates are, the judge of the facts and of the credibility of the witnesses. They are indeed in a similar position, I think, to a Judge in that respect, and the Court will not interfere with their findings of fact unless they see that they have come to a conclusion they reasonably should not have on the evidence before them. The same principle would guide a Court in interfering with the decision of Magistrates on fact, as in directing a new trial upon the finding of a jury on facts. That being so, I think that when the Magistrate said he disbelieved the account given by the accused, we must take it that he came to a right conclusion, unless we see from the account given that he should not reasonably have come to the conclusion he did upon the statements made by the accused. Now, with regard to the

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section under which this information was laid, that is Section 69, this Court has already held, in the case of *Rex* v. *Hahn*, how that section is to be read, that it is to be read with, and supplemental to, Section 49 of the Act in order to arrive at the meaning intended to be conveyed by that section, and the effect of that section as regards any person accused of an offence there mentioned. The 69th Section reads: "Every person who shall be brought before any justice, charged with having on his person or in any place, or conveying in any manner, any thing which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such justice how he came by the same, shall be liable to a penalty of not more than £10, or, in the discretion of the justice, may be imprisoned, with or without hard labor, for any term not exceeding six calendar months." The 49th Section, after empowering the police and other persons to apprehend certain offenders, goes on to provide that, "Every police officer or constable may also stop, search and detain any cart, carriage, or vehicle, in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may he found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained . . . . . shall be detained in custody until he can be brought before a justice to be dealt with according to law." The charge has to be laid against him in the words of that section, and upon that charge being laid, it is incumbent upon the person charged to give an account, to the satisfaction of the justice, of how he came by the goods found in his possession, provided that the goods so found may be reasonably suspected of having been stolen or otherwise unlawfully obtained. From the facts in this case it would appear that the appellant has been in communication with the Smelting Company, Fremantle, as to dealing with some ore that he possessed or was about to receive, and he paid one or two visits with reference to these transactions. He appears to have taken the ore to the Smelting Works, and to have left it there for the purpose of being dealt with. It was assayed, and the result of the assay shewing that the ore was very rich, his attention was drawn to it, and apparently the authorities at the Works became rather suspicious, in consequence of such a quantity of rich ore being taken to them by the appellant. It would appear from the evidence that they asked the appellant

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certain questions, and required him to do something, or to give them some evidence that he had come by this ore rightly. I cannot help but expressing the opinion, in passing, that I think the authorities at the Smelting Works acted very discreetly in this matter, and if other people were only to act in the same way there would not be so much opportunity for persons to get rid of stolen property, or property come by suspiciously. Upon being told the result of the assay the appellant admitted that he put in the parcel about 12 lbs. of telluride, and also told them that he got it from the Court at the Boulder. Apparently the police obtained knowledge of this from someone, and had heard that the appellant had been taking this rich ore to the Smelting Works for the purpose of having it dealt with there. The appellant asked the manager whether he could keep the ore at the Works, but on the latter refusing the appellant went to the Works in a cart in order to take it away. That was on August 14th, and it was after he had gone to take that ore away, and was in the act of removing it in his cart, that he was accosted by detective Lynch. Lynch, according to his evidence, saw the defendant on the road going towards the Smelting Works. That was apparently when he was taking the cart to the Works in order to remove the ore. In about a quarter of an hour he returned with the cart and was stopped and questioned by the detective. Lynch told him who he was, and said that it had come to his knowledge that the appellant had sent ore to the Smelting Works. The appellant said "Yes, I have it in the cart." He was then asked to satisfy the detective that he was in lawful possession. The appellant handed him a receipt, and upon being asked whether the stone in the cart was that referred to in the receipt, he replied "Yes, but I have 12 lbs. of telluride which was a portion of some given back to me by the Court at Boulder." There was no attempt to deceive. The man was open and candid with the detective in accounting for the ore which he had in the cart. He also said that he had bought about 14 lbs. of sweepings. The detective does not appear to have been satisfied with the account, and he took the appellant into custody and to the station. Afterwards he charged, as the information indicates, and the defendant was convicted. Dealing with the detective's evidence, as bearing upon the question of whether, in the circumstances, the appellant might, in the words of the section, have been charged with being in possession of ore reasonably suspected of having been stolen or otherwise unlawfully obtained, I cannot

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see any evidence from which one could reasonably come to the conclusion that there was any suspicion of this ore being stolen; but, independently of that I think the circumstances pointed to by the evidence are not such as were contemplated by these two sections of the Police Act. It is very exceptional legislation, and legislation of a very arbitrary character, because it allows a person to be suddenly arrested and charged, and called upon to give a satisfactory explanation as to how he became possessed of the goods found on him. That is not the ordinary law, because it is only in cases where felony is committed that a search warrant may be granted on the oath of the applicant that a felony has been committed, and that he has reasonable grounds for supposing that the goods, the subject of the felony, are in the possession of the party against whom the warrant is asked for. Then a warrant is obtained and the party arrested would be arrested upon it, but here the power is given to suddenly stop a person on the *ipse dixit* of a constable without a warrant at all. Therefore, it behoves the Court to be careful to see, before they allow a prosecution of this sort to be held good, that the requirements and intentions of the Statute have been complied with. In the case of *Rex* v. *Hahn* (*a*), decided by this Court, the case of *Hadley* v. *Perks* (*b*), was referred to at some length, and although the question in the case now before the Court is not similar to *Rex* v. *Hahn*, where it was a question of whether the goods in a house could be seized and dealt with under these sections, and although there is only a distinction from the case of *Hadley* v. *Perks*, the decisions in those cases have a very strong bearing upon the present one. The English sections are exactly similar to those in our Police Act, and in the case of *Hadley* v. *Perks* the application of the sections is clearly pointed out by the Judges before whom it appeared. It would appear that the intention of the Act is to minimise the opportunities that might otherwise exist for people to dispose quickly of stolen property. The Act is more applicable to large communities, such as London and Manchester, or other large manufacturing towns, where so many people are moving about the streets, and there are so many opportunities for disposing quickly of property recently stolen. One case in illustration, by one of the Judges, was that of a man found with a bag of coffee in a street, a man not likely, from his position in life, to be in a position to purchase a bag of coffee, or to require such a quantity.

(*a*) Supra. (*b*) 35 L.J. Mag. Cas., 177.

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In that case he may be stopped, and it may be reasonably supposed that the coffee was not come by honestly, and he could be charged and called upon to give an explanation. And so it may be in many cases one can picture to oneself. There is the case of carriers with small carts, trading along the steet, and filled perhaps with articles stolen from some part of the city, and they are making off as fast as they can with the intention of disposing of this stolen property; they could be stopped and charged under this section. Of course circumstances have to be taken into consideration. It is not every man who is driving through the streets with a loaded cart who would be stopped, for he might be a man in the habit of doing that sort of thing, a man of good position and against whom no suspicion would arise. With regard to the appellant in this case there is no evidence to shew that he was a man upon whom a suspicion would rest in dealing with a quantity of ore, except the fact that he was at one time charged with having possession of telluride. This was some two years ago, but the charge was dismissed and the telluride was given back to him. What he was at Fremantle, what his occupation was, whether he was engaged in business and well-to-do, or whether he was a rogue and a vagabond, living on the proceeds of robberies, does not appear. The facts are simply as I have mentioned. He appears to be a man holding a gold dealer's license. He did everything openly, and there was nothing in the case to shew any secrecy at all with regard to this transaction. Indeed the facts that a great portion of this ore had been purchased by the appellant in the month of June previously, through his brother, and the only suspicious circumstance was his mixing with it a certain quantity of telluride, which he said he had in his possession for two years. He stated the circumstance in which it came into his possession, saying that it was in connection with a Court case, and was delivered back to him by order of the Magistrate. It was not like the case of a man saying that he had purchased ore two years back from some person whose name he did not know, whom he had never seen before, and whose whereabouts he did not know. He openly and candidly explained where he got the ore from. Now I come to the question as to the bearing of these sections upon the case, and whether it was ever intended that these sections should apply to such a state of facts. The appellant had previously communicated with the authorities of the Smelting Works, as to dealing with a quantity of ore he is going

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to send them. He took the ore to them, but the manager was unable, apparently, to come to terms with him. They would not allow the ore to remain there, as he wished, except at his own risk. He apparently did not think it worth while to leave valuable ore there without any protection, so he went to take it away. It was while he was doing so that he was met by Lynch and arrested. It was not at all such a case as that referred to in the decision of *Hadley* v. *Perks*, not being the case of a man who is usually plying about town with a cart who is suddenly found in possession of something very valuable, and who is conveying it away at a pace and in a direction that would lead anyone to suppose that he was trying to get rid of it as fast as he could. It was a case of a man carrying out an ordinary business transaction in a public way, not at all endeavouring to conceal his actions. It does not appear that it was night-time, or that there was any secrecy at all about it. He went to work in a public way, and he was only removing this ore in an ordinary way when he was questioned by the policeman. His address was apparently known. It was not the case of a man who might be seen at one moment and then lost sight of in the crowd and never picked up again afterwards. I think the observations of Justice Lush, in the case I referred to, apply with some force to the present case, and he is dealing with a section of the English Act similar to the one with which we are dealing. He says, "That section supposes . . . . . merely upon suspicion." Mr. Justice Shee says, "It seems to me that it applies . . . . . unlawfully obtained." There were no circumstances in the locality where this man was taken in charge to lead to the suspicion that the ore in the cart had been improperly come by. Indeed, from what he said to the appellant, the detective apparently knew all about the circumstances under which the ore was dealt with. He knew that the appellant had taken it to the Smelting Works and that they had refused to take care of it for him, and, therefore, he should have known, when he met this man, that he was conveying the ore away from the Works. At any rate, after the appellant had told him so he had no reason to disbelieve him. I do not think that the circumstances in which the appellant was stopped are circumstances within the meaning or the intention of the sections of the Police Act. They do not apply to such cases as this. Indeed, with regard to the evidence, if it were a question as to whether there was evidence upon which the

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Magistrate could find that this ore was stolen, I do not think there was. I do not think there was evidence that he could reasonably come to such a conclusion. There was evidence upon which he might possibly have come to the conclusion that the appellant had not given a satisfactory account, but before he is called upon to give a satisfactory account of how he became possessed of certain property, the prosecutor must satisfy the Magistrate that the goods might be reasonably suspected to have been stolen, or otherwise unlawfully obtained. For these reasons I think that the Magistrate was wrong in law in convicting the appellant in the circumstances.

HENSMAN, J. I am of the same opinion. The appellant was convicted under Section 9 of the Police Act. This section and Section 49 give very great powers to the police and Magistrates. Here there has been no proof of any felony, or even that any goods have, in fact, been unlawfully obtained from anyone: but the appellant had been convicted of being suspected of being in possession of goods unlawfully obtained or stolen, and without giving a reasonable account of them. Section 49 says that a police officer may stop and search any cart in which there shall be reasonably suspected to be anything stolen or unlawfully found, or any person reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained. He may take that person before a Justice, and the latter may adjudicate upon it, and unless the party gives an account to the satisfaction of the Justice of how he became possessed of the same, he is liable to be convicted. This Act, it is obvious, was meant for a class of case different from that referred to by the Judges in *Hadley* v. *Perks*, where persons are found in possession of and removing property under suspicious circumstances. Such persons can be apprehended, taken before a Judge, and called upon to give a reasonable account. If they do not do so they are liable to be fined or imprisoned. The case here is one in which a man, having a license to deal in gold, sent a great quantity of valuable ore to the Smelting Works, Fremantle, and there it remained for a considerable time, during which period he gave to the manager some account of how he became possessed of it. The manager declined to deal with it. The appellant asked the manager to allow the goods to remain there, but the latter not being willing, he conveyed them away. He did so openly, and when stopped by the police, who it is not

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improbable may have had information given to them previously, at once stated what he had in the cart and gave an account of where he had got the ore from. I am of opinion that this is a case altogether apart from the class of cases meant to be dealt with by this Act. It has never been attempted to be proved that the ore belongs to anyone else or that it had ever been unlawfully obtained. I will shortly refer to the observations of Justice Blackburn in the case of *Hadley* v. *Perks*, dealing first with the section as to whether it is open to the Magistrate to grant a warrant, he says, "Section 25 empowers a Magistrate to grant a warrant . . . . go further, and make oath." Therefore this Act was passed for that class of case, because it enables a person to be apprehended although there is no proof of felony or unlawfully obtained property, and it forces him to give an account of how he obtained possession of certain property. I am of opinion that the sections do not apply to a case of this kind, where property was openly sent to the Smelting Works, where there was no concealment whatever, and where it would appear probable that the police only waited until the man was conveying the goods away. The constable says that he saw the appellant go to the works with an empty cart and return with a full cart. The constable, and those who advised him, may well have thought that they could bring the case within the Act, but they could not do so. The decision of the Magistrate was wrong on the ground that the facts did not warrant him in deciding that the case was within the Statute. He was, therefore, wrong on the point of law. Further, I think there are very grave doubts of whether there was any ground of reasonable suspicion. The reasonable suspicion appears to be a suspicion of the constable arresting, and the evidence of that we have. When the appellant was asked what his name was he answered that it was Sharpe, and on being asked what he had in the cart he at once told the detective and gave him a complete account of it. I am very much inclined to doubt whether there may have been suspicion in the mind of the constable, and I do doubt whether it was a reasonable suspicion that the appellant was in possession of property which had either been stolen or unlawfully obtained. The next question is whether he gave a reasonable account before the Justice. He gave an account openly, and said that he had mixed with the bulk of the property a more valuable product which he had had for about 18 months, and which he received from the Court at Boulder.

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The question arises whether, having given that account, it was not necessary for the prosecution to shew that it was a false one. It was an account not in itself improbable, and there was no evidence to negative it, and the only evidence against them on that point was that he had sold this telluride, and had at first only produced a receipt for the small value of £7 10s. It was not shewn that he was told that it was full of very rich ore. He stated that he mixed with the parcel of ore 12 lbs. of telluride, and it might be said that he should have stated at once that it contained this rich material, but it should be borne in mind that when he shewed a receipt for the bulk and asked that the ore should be assayed, he must have known that it would be at once discovered that the ore was valuable and of much greater value than £7 10s. Therefore, there was really no concealment of the fact that the ore contained the telluride. However, I do not think it necessary to decide the case on the facts, although, if it came to be decided on the facts, I feel that I should have very great difficulty in arriving at the conclusion that the man laid himself open to conviction. This is a stringent Act, and should only be applied to such cases as the Chief Justice and I have alluded to. This we should probably both be prepared to do without the authority of the English case cited, and which confirms our opinion that these sections apply only to that class of secret transactions where property is being conveyed away, and where, unless apprehension takes place at once, the property would be lost and the defendant escape. In this case, if the man was to be charged with the offence, there should have been an attempt to prove that the property had been unlawfully stolen or obtained, and then he might have been brought within the general Criminal Law of the land of having stolen or received the goods. I think the conviction should be quashed. I have considerable doubts whether the Magistrate in this case had power to order the forfeiture of the property, but I do not give a decision on that.

Conviction quashed.

Solicitors for appellant: *Barker & Boultbee.*

Solicitor for respondent: *The Crown Solicitor.*

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Nov. 26.

The C. J
Hensman, J

CLIFT, Plaintiff (Respondent).

BIRMINGHAM and OTHERS, Defendants (Appellants).

Malicious prosecution—Findings of Jury—Malice—Continuing prosecution after knowledge that thing alleged to be stolen not property of prosecutor.

This was an appeal from a judgment of Hensman J., on the findings of a Jury.

The plaintiff was for some time in the employment of the defendants (who traded as the "Greenbushes Tin Smelting Company"), and lived on a tin mining lease which he had been working. On October 5th, 1901, one Bassidow, the defendant Company's manager, laid an Information stating that quantities of tin ore had been stolen from the Company's premises, and that he verily believed that such tin was concealed in the plaintiff's hut, and asking that the plaintiff might be brought before a Magistrate and dealt with according to law. On this Information a search warrant was issued and executed by a Sergeant of Police and the plaintiff was arrested, brought before the Magistrate, and at the conclusion of the evidence was discharged. He thereupon brought an action for malicious prosecution.

At the trial the Judge left certain questions to the jury which, with the answers thereto, were as follows:—1. Was Bassidow the prosecutor?—Yes. 2. Did Bassidow take reasonable care to inform himself of the facts of the case before he commenced the prosecution?—No. 3. Did the defendant honestly believe the charge he laid before the magistrate?—Yes. 4. In what he did was he actuated by malice?—Yes. We are of opinion that when Bassidow laid the charge in the first case he honestly believed that he had just cause, but by continuing the prosecution we think he was actuated by malice.

On these findings the Judge entered judgment for the plaintiff, and the defendants now appealed therefrom on the grounds—1, that there was no evidence to support the fourth finding of the jury; 2, that such finding was wrong and bad in law, and 3, that on the findings judgment was wrongly entered.

On Appeal.

Held, that the Judge properly entered judgment for the plaintiff on the jury's findings, and that the appeal must be dismissed. *Brown* v. *Hawks* (*a*) distinguished.

Northmore, for appellants. There was no evidence to support the fourth finding of the jury. There was no evidence of direct malice on the part of the defendants. The jury went outside the scope of the questions put to them. The question put to them was, "Was the defendant actuated by malice when he laid the charge?" and it had never occurred to plaintiff's counsel that there was any evidence of malice after the initiation of the prosecution.

By their rider the jury meant that there was no evidence of actual malice, but merely that by continuing the prosecution they thought the defendants were actuated by malice. The only case dealing with the case of a prosecution which was not malicious

(*a*), 1891, 2 Q.B., 718.

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when begun, becoming so by the prosecutor continuing to press the charge is *Fitzjohn* v. *Mackinder* (*a*), but that case is not an authority for that proposition, but merely contains the "dicta" of some of the Judges, and is a very extreme case. When the jury find that the prosecutor honestly believed in the charge, there must be some evidence of actual malice to entitle the plaintiff to succeed, and especially so when the malice was only found to have been exhibited after the prosecution had begun. When once the criminal law was set in motion, in the absence of almost positive knowledge that he was prosecuting an innocent man, it was the prosecutor's duty to put the evidence before the Court, and the Court was the proper authority to decide whether there was a case against the accused or not. It was not competent for the jury, in the face of the fact that the prosecutor was honest in his belief of the truth of the charge when he laid it, to infer malice from the circumstance that the prosecution was continued. Once there was the finding of honest belief there must be some direct evidence of sinister motive. *Brown* v. *Hawks* (*b*).

Haynes, for the respondent. When the charge is untrue it is sufficient to support the finding of malice. The charge here was untrue. The tin found on plaintiff's premises was not the property of the Company. That distinguishes the present case from *Brown* v. *Hawks*, in which the property found *did* belong to the prosecutor. The defendants knew, previous to the hearing of the charge, that the tin seized at the plaintiff's hut was not the Company's, and notwithstanding that knowledge, proceeded to press the charge, whereby they shewed malice, which has been defined as "any other than an honest desire to see justice done." Although a person may initiate proceedings with good and lawful motives, yet if he continues after facts have come to his notice which should have induced him to abandon the prosecution, he renders himself liable to an action for damages. *Kelly* v. *Midland G. W. Railway Co.* (*c*).

Northmore, in reply.

STONE, C.J. This is a motion to set aside a judgment directed to be entered in favor of the plaintiff, and to enter judgment for the defendants on the ground that there was no evidence to support

(*a*) 30 L.J.C.P., 257. (*b*) 1891, 2 Q.B. 718.
(*c*) 7 Irish Rep. C.L., p. 8.

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the finding of the jury upon the fourth question submitted to them at the trial, that such finding was wrong and bad in law, and that on the finding of the jury the judgment so directed to be entered was wrong. The action was one for false imprisonment and malicious prosecution. At the close of the plaintiff's case, upon the motion of counsel, the claim in respect of false imprisonment was withdrawn from the jury, and we are therefore only concerned in this application in dealing with the claim for malicious prosecution. Certain questions were submitted to the jury and were answered as follows:—1. Was Bassidow the prosecutor?—Yes. 2. Did Bassidow take reasonable care to inform himself of the facts of the case before he commenced the prosecution?—No. 3. Did the defendant honestly believe in the charge he laid before the Magistrate?—Yes. 4. In what he did was he actuated by malice?—Yes. 5. If the plaintiff is entitled to a verdict what is the amount of damages?—£350. Now with regard to the fourth finding of the jury, that in what the prosecutor did he was actuated by malice; objection is taken to this judgment, and it has been urged that the jury having found that the defendant honestly believed in the charge he laid before the Magistrate, it was incumbent upon the plaintiff to shew some evidence of express malice on the prosecutor's part in proceeding with this prosecution. The jury, however, added a memorandum to the fourth finding in these words:—"We are of opinion that when Bassidow laid the charge in the first case he honestly believed he had just cause, but by continuing the prosecution we think he was actuated by malice." Now, but for that rider, I think this case would have to be decided upon the authority of the case of *Brown* v. *Hawks*, which has been referred to, because, in that case, which was an action for malicious prosecution, exactly similar questions to these were left to the jury, and findings also were the same, and it was held that as the jury had found that the defendant honestly believed in the charge he laid before the Magistrate, it was incumbent upon the plaintiff to shew some express malice, because it did not follow that although the plaintiff honestly believed in the charge, there might not have been something behind which pressed him forward in proceeding with the prosecution. A man might honestly believe an accused to be guilty of a charge brought against him, but still he might not be proceeding with the prosecution in consequence of that honest belief, but from some spiteful or indirect feeling of

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malice towards him; in other words, not with a view to bringing a guilty person to punishment, in order to check the commission of crime, but from some spiteful motive against the accused, and, therefore, if that is proved, and it is also proved that there is an absence of reasonable and probable cause for the prosecution, then the defendant must suffer, and he is liable to damages upon an action against him. However, in this case, as I have said, the jury found this rider in which they explain what they mean when they say that he was actuated by malice, notwithstanding that he honestly believed in the charge laid before the Magistrate. We gather, therefore, that in finding he was actuated by malice the jury did not mean malice at the time he laid the charge, but that from something that came to his knowledge after he laid the charge. If he acted as a discreet man he ought to have withdrawn from the prosecution. Now that "something," which it is alleged came to his knowledge after he laid the charge, and when he was not actuated by malice, is the fact that he knew that this tin that the accused was charged with having in his possession as belonging to the defendant Company, did not belong to the defendant Company. It should be borne in mind that the first step taken in this proceeding was the obtaining of a search warrant. I need not go into the facts which came to the knowledge of the prosecutor and led up to his applying for this search warrant, but he obtained a search warrant on the ground that "he had reasonable cause to suspect, and did suspect, that tin ore was concealed in or about the dwelling house and premises of George Clift," that is, the plaintiff. The plaintiff appears to have been arrested and subsequently the prosecutor, on the 8th October, appears to have taken part in a prosecution, and, therefore, made himself responsible for the consequences of that prosecution against the plaintiff upon a charge of having a quantity of tin ore, the property of the Greenbushes Tin Smelting Company, in his possession, reasonably supposed to have been stolen. Now it appears that there are two classes of tin ore: one known as the "Bunbury End," and the other as the "Spring Gully" tin. According to the evidence of Parsons, it would appear that the tin ore that the plaintiff was suspected of having in his possession belonging to the defendant Company was "Bunbury End" tin, and not "Spring Gully" tin, and Parsons in his evidence says that the tin that he saw in the Police Court was "Spring Gully" tin. Now, according to the samples that were produced, there is a very

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great difference between "Bunbury End" tin and "Spring Gully" tin. Anyone at a glance can see the very marked difference there is. Therefore we find the prosecutor proceeding against the plaintiff upon a charge of having this "Bunbury End" tin belonging to the Greenbushes Tin Smelting Company in his possession, reasonably supposed to have been stolen. The jury have found that he honestly believed in the truth of that charge. They have found, notwithstanding that, that he did not take reasonable care to inform himself of the facts before he commenced the prosecution, and I take it upon that finding the learned Judge would be justified in coming to the conclusion that there was reasonable and probable cause. So far, then, the defendant is acquitted of anything that would make him responsible or liable for damages in this form of action. But now we have to look at this rider attached to the verdict and see whether anything occurred subsequently to the laying of this information which ought to have induced the defendant to stay his hand and withdraw from the prosecution. From the evidence it appears clear that after he had laid the charge, and before he went on with the proceedings on the 15th October, he became aware that this ore which had been seized under the search warrant turned out not to be "Bunbury End" tin or ore belonging to the defendant Company, but totally different ore, namely, "Spring Gully" tin. The prosecutor admitted this before the Magistrate, although he attempted to qualify that admission to a certain extent when giving his evidence upon the action in the Court below. But in his cross-examination he admitted that he said before the Justices, "This is 'Spring Gulley' tin"—that was the tin that had been taken from the plaintiff's residence under the search warrant. He, therefore, knew before he went further with the proceedings, that there was a mistake somewhere, that whereas he had taken part in a charge against the plaintiff for having in his possession some ore belonging to the Greenbushes Tin Smelting Company, supposed to have been stolen, ore of a different nature to that belonging to the Company, in fact, someone else's ore, had been found in his possession, and not the Company's ore. Now, can it be said for one moment that, with a full knowledge of that circumstance, he ought to have gone on and called upon the plaintiff to account for this ore that did not belong to him? What had he got to do with ore belonging to someone else? What had ore, belonging to someone else, got to

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do with the charge that the prosecutor was instrumental in laying against the plaintiff, that he had a quantity of tin ore—not *some* tin ore belonging to someone, but tin ore belonging to the Company—in his possession, reasonably supposed to have been stolen. I think the only conclusion we can come to is that a discreet man would at once have said, under those circumstances, that there had clearly been a mistake, and particularly when he subsequently knew that a most important element in the case was wanting, that was evidence with regard to the finding of the marked bag which was said to have been shewn by police sergeant Smythe to him, and which had previously been marked, and had been moved from the vicinity of the closet near the Company's works. There appears to have been no evidence of that bag being forthcoming, and the evidence is very slight, if any, of that marked bag being found upon the plaintiff's premises. At any rate, it is open to remark, and to very grave suspicion, I think, that sergeant Smythe did not think it necessary to give any evidence with regard to this particular bag, or to account for its not being produced. All he referred to was certain bags that he had found in the possession of the plaintiff, making no allusion whatever to this particular bag, the production of which, and evidence with regard to its discovery at the plaintiff's residence, might have had a very different effect upon the mind of the Magistrate. As I said just now, it was a most important element in the case against the plaintiff—the production of this bag, and the previous finding of it on the plaintiff's premises. Well now, with a knowledge of those facts, the defendant prosecutor went on with his prosecution, and I think that, under those circumstances, there was some evidence upon which a jury might reasonably come to the conclusion that he was influenced by some motive other than an honest intention to sift the guilt or innocence of the plaintiff or to bring a guilty man to justice. Holding this opinion, I think that the motion should be dismissed.

HENSMAN, J. I am of the same opinion. It is desirable to consider what the statement of claim was. It alleged that on the 5th of October the defendant falsely and maliciously laid a charge against the plaintiff, that on the 8th October he had the plaintiff brought before a Justice and remanded to the 15th October, and that on the 15th October he had him again brought before the

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Justice, when he pressed the charge against the plaintiff, which was eventually dismissed. It appears to me that in an action for malicious prosecution, if the plaintiff can shew to the satisfaction of the jury that at any stage of that prosecution, from the time of original arrest or of laying of the charge up to the dismissal, the defendant acted unreasonably and maliciously, the plaintiff is entitled to a verdict. It seems that on the 6th October the plaintiff's premises were searched for the tin, one bag of which had been missing the day before, and a number of bags of tin, amounting to half a ton were found there. When Bassidow laid the charge what he had before him were the facts as stated to him by Parsons, that a bag had been missed from premises of the Greenbushes Smelting Company, that it had been seen to be in the bush near their premises, that the plaintiff had been observed under suspicious circumstances near that bag, and that the bag had afterwards been removed and had been found at the plaintiff's premises. At that time Bassidow had not seen the tin which was found at the plaintiff's hut. The findings of the jury were that Bassidow was the prosecutor, that he did not take reasonable care to inform himself of the facts of the case before he commenced a prosecution, and that at the time he laid the charge he honestly believed in its truth. But they further found that he was actuated by malice to this extent, that although when he laid the charge he was honest—that is, not malicious—yet, by continuing the prosecution he was actuated by malice. The learned counsel for the defendant has asked us to say that there was no evidence in support of that finding. But on the 15th, when the charge came on for hearing, Bassidow saw the tin found at plaintiff's hut, and formed the opinion that it was not his (Bassidow's) tin. He went on with the charge when he must have known that he could not support it, because, although ten hundredweight of tin was found on the plaintiff's premises, there was no evidence that any portion of it belonged to the defendants. That fact was, to my mind, evidence upon which the jury might, if they thought fit, find that Bassidow was actuated by malicious or improper motives. There is the further fact that he knew that Parsons, who said that he had seen the plaintiff performing suspicious movements in the neighbourhood of the lost bag, was on bad terms with the plaintiff. He also knew that the bag, which would have been a most important link in the evidence, was not forthcoming; that the police had stated that it was lost, and I think we may infer that he

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knew that the police were not going to say anything about that bag before the Justices. It may not be so, but the jury were entitled to take the matter into their consideration. I am of opinion that there was evidence upon which the jury might properly find as they did. Upon the second part of the motion, that on the findings of the jury the judgment, as directed to be entered, was wrong, I think that on the findings the only judgment that could be entered was for the plaintiff. I am of opinion that this judgment ought not to be disturbed.

Appeal dismissed.

Solicitors for appellants: *Moorhead, Northmore & Lukin.*

Solicitors for respondent: *Ewing & Downing.*

LAWRENCE AND ANOTHER, PLAINTIFFS (APPELLANTS).

LAWRENCE AND ANOTHER, DEFENDANTS (RESPONDENTS).

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Nov. 29.

The C. J. *Hensman*, J.

Construction of will—Void condition—Real Estates Administration Act, 1893—*Rule against perpetuities.*

This was an appeal from an order of Parker, J., made in Chambers upon an originating summons, taken out for the purpose of determining the construction of the will of one Wm. Lawrence, deceased. The plaintiffs were the trustees under the will, and were also legatees. The will contained a direction for the sale and division of the testator's real estate so soon as £33,000 could be obtained for the same. The plaintiffs adduced evidence shewing that the value of the real estate was about £16,000 and that in all probability the value fixed by the will would never be reached, and they asked for leave to sell the estate for the best price obtainable, in the interests of all the beneficiaries who had concurred in the application. The learned Judge was of opinion that the order should be made as asked by the plaintiffs, but as there was no party to appeal against such an order, he made an order adverse to the plaintiffs, so as to facilitate an appeal to the Full Court.

On Appeal.

Held, that the condition of the will was void as defeating the estate vested in the executors under the Real Estates Administration Act, 1893, and also as infringing the rule against perpetuities.

Haynes, for the appellants, argued that the condition postponing the time of sale was repugnant to the estate vested in the trustees.

Sayer, for the respondents, argued that by the Real Estates Administration Act, 1893, all the estate was vested in the executors as such, and that any condition in the will restraining the executors from alienating the estate was void and repugnant to the estate of the executors, and repugnant also to the legacies. He cited *Rosher* v. *Rosher* (*a*), and *Kelly* v. *Elliott* (*b*).

(*a*) 26 Ch. D., 801. (*b*) 1896, 2 Ch., 353.

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STONE, C. J. In this case the testator devised and bequeathed his real and personal property to his trustees and executors upon trust to receive the rents and profits from the real estate, and certain dividends and profits arising from portion of his personal estate, and thereout to pay his just debts and his funeral expenses, and any interest which might accrue due in respect of mortgages upon his real estate, and thereafter to pay the surplus or such moneys into some bank for the purpose of forming a fund to pay the mortgage debts on his real estate; and he directed that his real estate should be sold as soon as £33,000 could be obtained for the same, and after payment and discharge of the mortgage and other debts, and until such sale, he directed that the rents and profits received by his executors and trustees should be divided equally amongst certain of his children, and that immediately after the sale of his real estate as before directed, and after payment of the mortgage, the net proceeds of the sale should be divided amongst certain of his children named, in certain proportions. Now the question is whether the direction of the testator postponing the sale of the property until £33,000 could be obtained for it, is a void condition. It seems to me that it is clearly void as repugnant to the Statute, the Real Estate Administration Act, 1893, which provides that the real estate of a testator shall, subject to all trusts and equities affecting the same (that, I presume means the trusts and equities created by the testator during his lifetime), be held by the executors, and vest in the executors for payment of the debts of the deceased in the ordinary course of administration. It is not open to any testator to defeat that provision of the Statute, although he may create certain trusts and give certain directions with regard to the disposition of his property, subject to the Statute. The estate, as I pointed out during the course of the argument, is vested in the executor for the payment of debts. It is only vested in him for that purpose, and subject to that purpose the estate devolves upon the parties upon whom it is vested under the will, and the executor, if any of the estate is left in his hands after payment of the debts, is to transfer the property to the parties entitled under the will, and if there be trustees, to the trustees, who are to hold it subject to the trusts. If this condition were allowed the object of the Statute would be defeated, which is the speedy payment of the creditors of the deceased out of his real and personal estate, because it is

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impossible to say when the trustees would be in a position to realise this sum of £33,000 mentioned in the will, and pay the debts. One debt in particular is a mortgage debt, and the payment of the mortgagee is not to be postponed until the property may become of such a value as that mentioned by the testator. The mortgagee is entitled to require payment of his principal at the expiration of the time allowed by the mortgage, and if the executor and trustee is not in a position to pay that amount, the mortgagee would be empowered to sell, and being empowered to sell he would really be defeating the object which the testator had in view of his children getting as much out of the property as possible. That, I think, is the first ground upon which this condition is void, it is void as a condition which, if allowed to stand, would defeat the estate vested in the executors under the Administration Act. Then it is, I think, also void as a condition repugnant to the devise. The devise, although it mentions that the trustees are to hold this property upon trust to receive the rents and profits arising out of the estate, and to pay out of those rents and profits the debts of the testator, still postpones the realisation of the estate for an indefinite time, until the £33,000 can be realised. That amount may be realised or it may not. It might be realised immediately, or it might not be realised for many years to come. At any rate, there is that great uncertainty hanging over the condition imposed by the testator, and that seems to me to be contrary to the rule against perpetuities. It is impossible to say how long this property might not lie out if that condition were allowed to stand. Therefore, on the two grounds I have mentioned I think this condition is void.

HENSMAN, J. I am of the same opinion. The land is vested in the trustees and executors to pay out of the rents and profits the debts and funeral expenses, and then there is a direction that the real estate shall be sold as soon as £33,000 can be obtained. If the will means that the debts are not to be paid until the estate is sold for £33,000, it is clearly against the Statute, which says that the land is to vest in the executors for the purpose of, first, payment of the debts, and then afterwards according to the trusts of the will. With regard to the other point, as to whether the will violates the rule with regard to perpetuity, I am inclined to the same opinion as the Chief Justice, but as I do not base my

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judgment on that point I do not think it necessary to say anything further on that matter. I agree in the opinion that this condition is void.

Appeal allowed, and the condition in the will declared void, but the will allowed to stand without the condition.

Solicitors for appellants: *Haynes & Purkiss.*

Solicitor for respondents: *W. F. Sayer.*

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Dec. 19.

The C. J.
Hensman, J.
Parker, J.

IN RE JANE DONEGAN (DECEASED).

VASSE, SAYER AND OTHERS, DEFENDANTS (APPELLANTS).

WROTH AND HOLIDAY, PLAINTIFFS (RESPONDENTS).

Will—Construction—Intention of testatrix—Direction to sell—Disposal of proceeds of sale—"Estate"—Creation of fund for payment of debts and legacies—Residuary devisees—Next of kin.

This was an appeal from an order made upon an originating summons which had been taken out by the respondents, who were the trustees under the will of Jane Donegan, deceased. The question to be decided on the summons was whether a certain property mentioned in the will passed thereunder to Annie Vasse and Florence Sayer, the residuary devisees, or to the next of kin, as upon an intestacy. The Judge in Chambers decided that there was an intestacy with regard to the property in question. The portions of the will, the construction of which was in question, sufficiently appear in the judgments of the Court.

Held, that there was an intestacy as regards the property in question, which accordingly passed to the next of kin, and that the appeal must be dismissed.

Moorhead, K.C., for the appellant Sayer. The residuary legatees became also residuary devisees in regard to the property. The testatrix having by deed granted a life interest in the property to her parents, had, so to speak, provided for them, and from that it was clear that she did not intend to die intestate with regard to that portion of her estate. When, therefore, she directed that the balance of her estate should be divided between Vasse and Sayer there was running in her mind a dealing with that particular property on her death. The Court always leans against intestacy. *Re Salter, Farrant* v. *Carter* (*a*). There are no particular words required to constitute a residuary devisee. That may be moulded by the Court from a construction of the will. *Singleton* v. *Tomlinson* (*b*). Vasse and Sayer are entitled to the whole residue of the estate after payment of debts. The Court should construe the will to the effect

(*a*) 44 L.T., 603. (*b*) 3 A.C 404; 38 L.T. 653.

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that the testatrix at the time she used the words, "the balance arising out of the proceeds of my estate," had in her mind the falling into the residue of this particular land and a second sale of the estate. *Towns* v. *Wentworth* (*a*), *In re Bagot*, *Paton* v. *Ormerod* (*b*), *Dobson* v. *Browness* (*c*).

A. D. Stone, for the next of kin, cited *Blight* v. *Hartnoll* (*d*). There is no true general residuary devise or bequest. The Newcastle property is absolutely taken out of the will and is undisposed of. The Court ought not to regard the previous dealings of the testatrix with this property in order to find out what her possible or probable intentions were, when they are plainly disclosed on the face of the will. The Newcastle property is absolutely excluded from the burden of debts and exempted from the power of sale and conversion given to the trustees. The words "the balance arising out of the proceeds of my estate," mean "my estate that I have directed to be converted." *Wainman* v. *Field* (*e*) is absolutely in point, and I rely on it. There is an intestacy as to the Newcastle property which passes to the next of kin.

Moorhead, K.C., in reply.

Hensman, for the trustees under the will.

PARKER, J. In this case it appears to me that the whole question is what is the meaning of the word "estate" in this clause of the will, "I then direct that the balance arising out of the proceeds of my estate shall be divided." What did the testatrix mean by the word "estate"? It is used in connection with "balance arising out of certain proceeds." She evidently, therefore, contemplated that the trustees or executors would have certain moneys in their hands arising out of this estate which is to be divided. Well, it is obvious that to arrive at the intention of the testatrix we ought to look at the whole will and see if we can find from any other portion of the will what she means by any particular word or words. We find by the will that she directed that the whole of her personal effects, together with the whole of her freehold property—virtually she directed that the whole of her real and personal estate, with the exception of her Newcastle suburban property occupied by her mother—should be sold. Well, that

(*a*) 11 P.C., 526.
(*b*) 62 L.J. Ch., 1006.
(*c*) 5 L.R. Eq., 404.
(*d*) 23 Ch. D., 218.
(*e*) Kay's Rep., 507.

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direction that it should be sold, authorised the trustees to sell. Therefore they were authorised to sell the whole of her real and personal property except the Newcastle suburban property. Then she goes on to say, "the proceeds arising therefrom" (that is to say from the sale of all this real and personal property except the Newcastle Suburban property), "after the liquidation of all my just debts, shall be disposed of as follows, that is to, to my sister Eliza Bird £100, to my nephew Frederick Tomkin £250; I then direct that the balance arising out of the proceeds of my estate shall be divided in equal manner, share and share alike, between Annie Vasse and Florence Sayer." Now it seems to me perfectly clear from the words that I have read, and the previous portion of this will, that the intention of the testatrix was to divide between Annie Vasse and Florence Sayer the balance arising from the proceeds of the property which she had authorised the executors to sell, and that the word "estate" there must be limited to the estate which she had so directed the executors and trustees to sell, and that it does not include, nor did she intend it to include the whole of her estate, that is she did not intend to include in it this Newcastle suburban property. I am further confirmed in this view by bearing in mind that had the testatrix desired to devise this Newcastle suburban property to Annie Vasse and Florence Sayer, there was no reason why she should not have done so. She might have said, "As to the Newcastle suburban property, I devise it to Annie Vasse and Florence Sayer in equal shares." There was no need that it should be sold by the trustees and executors. She might have devised it to them in equal shares without any sale. Therefore, in my view the opinion expressed by the Chief Justice was correct.

HENSMAN, J. I am of the same opinion. By the will the testatrix directs that immediately after her death the whole of her estate, except one particular piece of land, shall be sold to the best advantage. It is to be observed that there is a direction for an immediate sale, and the proceeds arising therefrom, after payment of debts, are to be divided as follows:—£100 to Bird, £100 to Tompkin and £250 to someone else. The will goes on, "I then direct that the balance arising out of the proceeds of my estate," which means, I think, in other words, the balance which remains after payment of debts and legacies, "shall be divided in equal

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manner, share and share alike, between my nieces." I have listened with interest to the arguments of counsel with regard to what we may think was the intention of the testatrix. It may be that the testatrix did not wish to do otherwise than to dispose of the whole of her property; but it would be dangerous to endeavour to arrive at the intention of a testatrix, except from the words of the will. The words of the will "the balance of the proceeds of the estate" appear to me clearly to refer to the balance of the proceeds of the estate which the trustees were authorised to sell immediately after the death of the testatrix, which did not include the land in question.

STONE, C.J. I am of the same opinion. I do not wish to say anything further, as this is an appeal from my decision, except that I think it is clearly apparent from the wording of the will that the intention of the testatrix was to create a fund out of her property (with the exception of this Newcastle suburban property) for the payment of her debts and the payment of certain specific legacies, and that after the payment of her debts and those legacies the the balance of that fund was to be divided in equal shares between her nieces, Annie Vasse and Florence Sayer.

Appeal dismissed with costs.

Solicitors for appellants: *J. & R. Maxwell.*

Solicitors for respondents: *Nicholson and Hensman.*

CLARKSON *v.* WADE.

1901.

Nov. 21.

The C. J. *Hensman*, J.

Land Act, 1898—62 *Vic.*, *No.* 37, *Sec.* 148—*Evidence of posting of notice of survey—Waiver of objection to jurisdiction—Forfeiture of claim for compensation—Selection—Pastoral lease.*

Case stated under Section 21 of the Arbitration Act, 1895 (59 Vic. No. 13) by A. S. Roe, P.M. of Perth, as umpire in an arbitration under Section 148 of the Land Act, 1898, 62 Vic., No. 37, to decide upon a claim made by the holder of a pastoral lease for compensation for improvements thereon against the selector of a Homestead Farm on such lease. It was proved on the Arbitration (1) That the selector (Wade) applied for his land on April 17th, 1899. (2) That notice of such application was sent to the claimant (Clarkson) by the Lands Department on July 28th, 1899. (3) That the claimant wrote to the Lands Department on September 12th, 1899, that he could not claim until the land was surveyed. (4) That a survey of the land applied for by the selector was made on December 30th, 1899. (5) That a copy of the survey was sent by the Lands Department to the claimant on March 7th, 1900. (6) That a formal claim was received from the claimant by the Lands Department on June 26th, 1900, *i.e.* 80 days after the posting of the survey. (7) That notice of the claim was sent by the Lands Department to the selector on July 4th, 1900. (8) That the selector replied on August 31st, 1900, repudiating the claim and appointing an arbitrator. (9) That the service of the Notice of Survey on the claimant was sent by post in the usual way, a memo. or endorsement being made by the Lands Department

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on the papers in the usual way. The arbitrators being unable to agree the umpire decided—(1) That the usual memo. or endorsement on the papers in the Lands Department was sufficient evidence of the posting of the survey to the claimant on March 7th, 1900, and (2) That the claimant forfeited his right to claim compensation by not claiming within 60 days from the posting of the copy of notice of survey, as provided by Section 148, Sub-section 2 of the Lands Act, 1898.

The questions for the decision of the Court were—(1). Was there sufficient evidence of the posting of the Notice of Survey? (2) Whether the selector waived any objection to the jurisdiction by appointing an arbitrator and appearing at the arbitration? (3) Whether the claimant's failure to claim within 60 days from the posting of the copy of survey operated as a forfeiture of his claim as a Pastoral Lessee for compensation under Section 148, Sub-section 2 of the Lands Act, 1898?

Held, (1) That the mere production of a memo. or endorsement on certain papers by one party, to the effect that notice had been posted was not sufficient evidence of the posting, as the notice required by the Act is an essential thing and must be strictly proved in accordance with the rules of evidence. (2) That the selector waived his objection to the jurisdiction, and (3) That Sub-section 2 of Section 148 of the Lands Act, 1898 is imperative and not merely directory, and that therefore the claimant by failing to claim within the 60 days from the posting of the copy of survey forfeited his claim as a Pastoral Lessee for compensation under that section.

Haynes (with him *Maxwell*), for appellant.

Burt, K.C. (with him *Hardwick*), for respondent.

STONE, C.J. There are three points raised in this special case. The first is whether the endorsement on papers in the Lands Department of the fact that a certain notice was posted to the claimant was sufficient evidence of the posting of such notice; secondly, whether the selector waived any objection by appointing an arbitrator and appearing at the arbitration, and thirdly, whether the claimant forfeited his right to claim compensation by not claiming within 60 days as required by Section 148 of the Land Act of 1898. The last point is really the most important of the three. The section provides that a pastoral lessee in the occupation of his lease shall be entitled to claim from any person who, under the Act, selects any portion of the pastoral lease, the fair value of any lawful improvement existing on or appertaining to the land applied for, or which, being outside such land, have become valueless or lessened in value by reason of severance. The section then goes on to provide how such compensation is to be arrived at. The value of the improvements are to be ascertained by a competent person appointed by the selector and by the lessee, and in the event of any difference of opinion between them the dispute is to be determined by the Resident Magistrate of the district acting as umpire. Sub-section 2 says that within 60 days from the date on which the lessee

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is informed by the Minister that any land has been applied for in his pastoral lease the lessee shall inform the Minister of the value of the improvements existing on the land applied for, and Sub-section 3 enacts that if the selector thinks the improvements are rated at more than their value he may within the 60 days allowed, inform the Minister that he refuses to pay the amount claimed, and shall then name an arbitrator to meet the arbitrator of the lessee at the Court House of the district on a day to be fixed by the Minister, and the Minister shall notify the selector and lessee accordingly. Looking at the whole of that Section 148 and the several sub-sections, I find that I am unable to agree with the contention that Sub-section 2 is merely directory, because it is clear in looking at the other sub-sections that they are obligatory. Indeed a portion of Sub-section 2 which requires the Minister to inform the selector of the value placed on the improvements is clearly obligatory. I am unable to draw a distinction between one portion of the section and another. I think the whole section obligatory. I think it is obligatory upon the lessee to inform the Minister within a certain time, and it is obligatory on the Minister to immediately inform the selector of the lessee's claim. In that opinion I think I am supported in the case of *Barker* v. *Palmer* (*a*). That was a case in regard to a service of a summons under the County Court Act, and in regard to the meaning of a rule which required that the summons should be delivered to the bailiff 40 clear days before the return day. It was urged during argument that the service of the summons was bad, that the County Court Judge had no jurisdiction by reason of the plaintiff having failed to comply with that rule. In that case it was held that the County Court Judge was wrong in hearing the case, because the section prescribing the time was obligatory. So with regard to the rule of our Judicature Act, which requires certain things to be done and proceeding to be taken within a certain time; but for the power given to the Judge or the Court to extend the time mentioned in those rules the parties would be bound to a strict compliance with the rule in question. I think it is clearly intended that the time of 60 days mentioned in that sub-section should be obligatory upon the lessee and not merely directory. With regard to the second point that there was a waiver by appointing an arbitrator and appearing at the arbitration,

(*a*) 8 Q.B.D. 9.

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I think the contention of Mr. Haynes must be supported, because it appears from the case that the objection was not taken by Wade until after the case for the plaintiff had closed. The objection by Wade was that the arbitrator had no jurisdiction, because the procedure required by Section 148 had not been followed. Wade, however, came to the arbitration, and was there until the claimant closed his case. For that reason I am of opinion he must be held to have waived his objection, because an objection to jurisdiction must always be taken at the earliest possible moment. With regard to the other point that there was no evidence of the posting of the notice I think it is equally fatal. The arbitrators found that the memo. or endorsement was sufficient evidence of the posting. I am of opinion that that was no evidence at all. The notice required by the Act is a very important and essential thing, and it is essential that it should be strictly proved by the rules of evidence, and the mere production of a memo. by one party endorsed upon some papers that notice had been posted is clearly insufficient. Upon that point I think the claimant is also entitled to succeed.

HENSMAN, J. I am of the same opinion on all three points. With regard to the question of whether the 60 days is imperative or directory I agree that it is imperative to give the notice within that time. It comes clearly within the rule laid down in "Maxwell." Where powers or rights are granted upon certain formalities being complied with it is not unjust to expect their strict execution. In the present case a right is given to a lessee who has his land taken from him to recover a fair value for the improvements on that land, and one of the conditions is that within 60 days he shall furnish a certain statement. As to the second question I agree that Wade waived his objection. When the matter was being argued yesterday I was under the impression from what was said that Wade was ignorant that the condition as to the 60 days had not been complied with until he took the objection. It appears, however, that he knew of the fact, because he gave evidence of the posting of the notice. It is clear that Wade's agent knew that he had this point in reserve. I am of opinion that the right to object to the jurisdiction was waived. The arbitrator also wishes to know whether the endorsement on the papers at the Lands Office was sufficient evidence of the posting of the notice. It is clearly not. The only case in which such evidence would be receivable would be in the case of an entry

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in the discharge of his duty by a deceased person. This most essential point was not therefore proved.

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Solicitors for appellant: *J. & R. Maxwell.*

Solicitors for respondent: *Stone & Burt.*

McLEOD, DEFENDANT (APPELLANT).

WHEATLEY, PLAINTIFF (RESPONDENT).

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Dec. 17.

The C. J.
Hensman, J.
Parker, J.

Malicious Prosecution—Want of reasonable and probable cause—Malice—Recklessness in laying charge—Indirect motive—Evidence to go to jury—Non-suit—New trial—Appeal.

This was an appeal from a judgment of Hensman, J., on the findings of a jury in an action for malicious prosecution. The defendant, a diamond driller, had eight diamonds stolen from him in March, 1900. On the 6th and 7th June following certain diamonds were offered by the plaintiff for sale to one Elliott, who, having his suspicions aroused, acquainted the defendant therewith, who subsequently saw the diamonds and identified them as his property. The plaintiff and one Dowling were, at the instance of the defendant, arrested on the 8th June on suspicion of having stolen property in their possession. They were remanded on the 12th June. In the meantime the police collected statements in writing from various witnesses. These statements were seen by the defendant, who, at the request of the police, laid an information charging the plaintiff and Dowling with larceny of the diamonds. Both were committed for trial. Dowling was acquitted, the jury adding the rider that they did not believe two of the witnesses for the prosecution. Upon this a *nolle prosequi* was entered in the case of the plaintiff, and he then began an action for malicious prosecution, which resulted in a verdict and judgment in his favor. The following were the questions put to the jury and their answers thereto:—(1) Was the defendant the person who laid the information?—Yes, not in the first instance, but on the 12th June. (2) Did the defendant take reasonable care to ascertain the facts, and did such facts justify him in making the charge?—No. (3) Was the charge made in the honest belief of its truth, or was it made recklessly, or from anger, or from some indirect motive?—We find the charge was made either recklessly, or from some indirect motive. Upon these findings the Judge entered judgment for the plaintiff. The judgment was appealed from on the grounds (1) That there was no evidence of absence of reasonable and probable cause. (2) That there was no evidence of malice. (3) That the question of want of reasonable and probable cause should have been decided by the Judge and not left to the jury. (4) That there was misdirection. (5) That the verdict was against the weight of evidence. (6) That the damages were excessive.

Held (HENSMAN, J., dissentiente), that the judgment of the Court below must be set aside and judgment entered for the appellant.

James (*Pilkington* with him), for the appellant. The plaintiff must establish absence of reasonable and probable cause. There is no evidence of such absence. Before laying the charge the defendant had all the statements of the witnesses before him, whose credibility he had no reason to doubt, and upon those statements he had reasonable and probable cause for prosecuting. He could not possibly make further enquiries than he did make.

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Pilkington (following on the same side). There is no evidence of absence of reasonable and probable cause, and there is no evidence of malice. The jury acquitted Dowling because they did not believe Harn and Warren, otherwise they would have convicted, therefore, when the defendant laid the charge he had before him evidence which the jury say, if true, they would have convicted upon. There is nothing to shew that defendant knew the evidence of Harn and Warren would not be accepted. Defendant was quite justified in acting on the evidence of an accomplice even though it be not strong enough to convict, *Dawson* v. *Vansandau* (*a*). There is no evidence from which malice can be inferred. It was not found that defendant had not an honest belief in the charge, and, therefore, the findings of the jury do not amount to a finding of malice. *Brown* v. *Hawkes* (*b*). The questions are usually put separately:—(1) Was there honest belief? (2) Was there malice? Here the two have been mixed up and the result is it cannot be said for certain what the finding of the jury was on the question of honest belief. There only remains the finding that the charge was made recklessly, or from indirect motive, and, therefore, in the absence of honest belief, and there being no evidence of express malice, the finding of the jury is not sufficient to support the judgment for the plaintiff. *Lowe* v. *Collum* (*c*). On the question of non-suit I rely on *Stewart* v. *Equitable Society of the United States* (*d*), where questions were allowed to go to the jury, and after they had given their verdict the learned Judge granted a non-suit. In that case, although it was found in fact that due enquiry had not been made, nevertheless, in the face of that finding, the Judge held that there was not an absence of reasonable and probable cause, and that the plaintiff must be non-suited.

Haynes, for the respondent. This being a motion by way of appeal the only questions the Court has to decide are whether there was any case to go to the jury, and whether the findings support the judgment. On the first point it is only necessary to look at the evidence of the plaintiff and not at the evidence of the defendant at all, because if the case were decided on any other principle than that it would be practically treating this appeal as a motion for a new trial. It must be shewn that at the close of the plaintiff's case there was not evidence to go to the jury. If the case has gone

(*a*) 11 Weekly Rep., 516.
(*b*) (1891) 2 Q.B., 718.
(*c*) 2 L.R. Ir., 15., 13 Cox. C.C , 641.
(*d*) 8 N.Z.L.R., 647.

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to the jury the proper course is to move for a new trial, and not to come to the Court of Appeal. This is simply an appeal, and the plaintiff's evidence must be relied upon to see if it supports the verdict. Defendant had no evidence whatever to shew that the plaintiff stole the goods. There was a duty cast on the defendant, when proceeding against the plaintiff for larceny, on the doctrine of recent possession, to make enquiries as to what explanation the defendant made when charged with being in possession of stolen property. He made no enquiries, and the jury properly inferred that he acted recklessly. There was also a duty cast upon the defendant to enquire into the character of the witnesses upon whose testimony he was to rely. The jury were entitled to hold that defendant did not have an honest belief in the truth of the charge, first, on account of the absence of enquiry; secondly, by reason of defendant's threat, after being told that McKay could vindicate the plaintiff's innocence, that he did not care, and that he would go on with it; thirdly, on account of the careless collection of facts from McKay; fourthly, by reason of the polluted evidence of Harn and Warren which was improbable and untrue on the face of it. See *Abrath* v. *N.E. Railway Company* (*a*).

James, in reply. I rely upon *Brown* v. *Hawkes* (*a*) to shew that intemporate or hasty words are not malice. The words used in this case by the defendant, "I will go on with it now," are not such as to justify an inference of indirect motive. There was no evidence to support an inference of malice. The defendant shewed no *animus*, kept his hand free, informed the police and simply performed the technical act of signing the information.

STONE, C.J. It would be perhaps desirable that I should first of all deal with the question as to what power this Court, sitting as a Court of Appeal, has over the motion before it. It seems to me clear that the Court is entitled to deal with this application in the terms of the motion, that is, to enquire whether there was any evidence to go to the jury from which they could reasonably come to the conclusion that there was an absence of reasonable cause for this prosecution, and that the defendant in instituting that prosecution was actuated by malice. Had there been evidence to go to the jury, and there had been a conflict of evidence, and the jury had found on that evidence, the Court could not interfere with the

(*a*) 11 Q.B.D., 440, 11 A.C., 247. (*b*) (1891) 2 Q.B., 718.

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findings of the jury, sitting as a Court to hear an appeal from those findings. They could only deal with the case upon motion for a new trial, on the ground that the verdict was against the weight of evidence, but that is not the case here. The case comes before us as an application to enter judgment for the defendant upon the ground that the learned Judge who was sitting on the case before the jury, should not have allowed the case to reach the jury, and should not have allowed the jury to have given any decision upon the question, because there was really no evidence before them upon which they were to come to a decision. In all these cases of malicious prosecution, when the case gets before the jury, it is very difficult to get them to disassociate the question of reasonable and probable cause, from the question of the guilt or innocence of the person accused and who is bringing the action. It is, therefore, essential that if the evidence admits of it the Judge should take upon himself the responsibility of deciding whether there is any evidence to go to the jury of an absence of reasonable and probable cause, and whether, even if there should be an absence of reasonable and probable cause, there is any evidence to go to them of malice on the part of the prosecutor. In this case I am inclined to think that if the defendant had been content to accept the learned Judge's decision, at the conclusion of the plaintiff's case, that there was evidence to go to the jury, he would have undoubtedly have been entitled to set aside the judgment, because, in my opinion, at the conclusion of the plaintiff's case there was no evidence upon which the jury could come to a conclusion as to whether the defendant had reasonable and probable cause for instituting the prosecution, or whether he was influenced by malice in proceeding with that prosecution. In the case of *Abrath* v. *North Eastern Railway Company* (*a*), it is clearly laid down, not only by the Master of the Rolls (Brett) but also by Lord Justice Bowen, that the plaintiff is bound to give some evidence of the circumstances under which the prosecution was instituted. The Master of the Rolls says, "I wholly differ from the suggestion made that it is sufficient for the plaintiff to shew that he was innocent. If the plaintiff merely proved that, and gave no evidence of the circumstances under which the prosecution was instituted, it seems to me that he would fail; and a learned Judge should not be asked, without some evidence of the circumstances under which the prosecution was instituted, to

(*a*) Supra.

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say whether there was an absence of reasonable and probable cause. Now the evidence which is to determine the question, whether there was reasonable and probable cause, must consist of the facts and circumstances which existed, in fact, under which the prosecution was instituted." And Lord Justice Bowen says, "The question of whether there was want of reasonable and probable cause for the prosecution depends upon the materials which were in the possession of the prosecution at the time when it was instituted, and also upon the further point whether those materials were carefully collected and considered." It is, I take it, for that reason that usually upon actions of this nature the plaintiff puts in the depositions taken before the Magistrate in order to lay a foundation for his claim, to shew the materials and the circumstances upon which the prosecution acted. But, in this case, there was no information given by the plaintifl or his witnesses to the Court as to the circumstances under which the prosecutor acted. All the plaintiff sought to do, it appears to me, was to prove that he was innocent of the charge laid against him, and not to bring to the notice of the Court the facts and circumstances upon which the prosecutor acted. Now it is essential that the plaintiff in these actions for malicious prosecution should prove three propositions:—first of all, his innocence of the charge made against him; secondly, that there was an absence of reasonable and probable cause for the charge; and thirdly, that the defendant in making that charge was not influenced by a proper motive, but by some wrong and malicious intention. In determining whether there was a want of reasonable and probable cause, a question is frequently left to the jury as to whether the defendant made due enquiry before instituting that prosecution, and upon the finding of the jury in the negative upon that question, and also upon the finding of the jury that the defendant instituted the prosecution from some wrong and malicious motive, the Judge would find an absence of reasonable and probable cause. In this case the jury have found that the defendant did not make the necessary enquiries, and also that he laid the charge either recklessly or from some indirect motive. Now, if he laid the charge from some indirect motive, I think it must be taken that the jury negatived that the defendant had any honest belief in the charge that he made. I am not prepared to say that if he recklessly made the charge, that that finding would necessarily negative an honest belief. It just depends upon the evidence that was before

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the jury, upon which they could come to such a conclusion, and also upon the discretion of the learned Judge at the time. It may be that they intended to convey by that finding that the defendant did not care whether the plaintiff was guilty or innocent, that he would go on with the charge; that he was annoyed over the matter, and (as suggested by Mr Haynes) that he was determined to put a stop to this illicit disposal of diamonds, and that he wanted to give a warning to others, and he did not care whether the plaintiff was guilty or not, but that all he wanted to do was to expose this unlawful dealing with diamonds. I think if that was what the jury intended to convey by the finding, "that he was either reckless or was actuated by some indirect motive," that that also would negative an honest belief. I have expressed my opinion with regard to the plaintiff's case, and now we have to look to the evidence for the defendant, as the defendant, although he moved for a non-suit, accepted the ruling of the Judge and proceeded to call his evidence. We have, therefore, now to see whether, in the course of that evidence, there was anything to supply what was deficient in the plaintiff's case, in other words, whether that evidence established a want of reasonable and probable cause for these proceedings. I have no hesitation in expressing my own opinion that the evidence disclosed the reverse. It disclosed, in my opinion, ample foundation for the charge laid against the plaintiff. It is said that the defendant ought to have made further enquiries before he laid the charge; but before dealing with the evidence upon which the defendant proceeded, let us look at his conduct in connection with this prosecution, and enquire whether he acted as a reasonable and discreet man would act under the circumstances His diamonds had been stolen. He was told by a manager of one of the mines that the plaintiff had been trying to dispose of these stolen diamonds, and that the plaintiff had been making incorrect statements, with reference to the disposal of these diamonds: he had refused to state for whom he was selling them, he had made a mis-statement with regard to the number of diamonds that he was going to sell, and also he had made, apparently, a mis-statement with regard to the quantity of diamonds that he was likely to have to sell. What did the defendant do under those circumstances? Did he go and lay an information? No; he went and gave the information that had been imparted to him, with regard to these diamonds that had been stolen from him, to the

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police—the very people that he ought to have given the information to—and then the police took the matter in hand and they made enquiries into the circumstances. The police, I take it, under those circumstances, were acting as the agents of the defendant. The defendant, apparently, did not care to go into the question himself, he thought he could not do better than leave the matter in the hands of the police, and the police, acting as his agent and taking his instructions, went and made enquiries with regard to the circumstances under which the plaintiff came to attempt to dispose of these diamonds. They enquired from several people, and they not only enquired from several people but they got each of those people to make a statement in writing, so that they might have something to go upon when the proceedings were taken before the Magistrate. Well, the police took proceedings. The jury have found that the first proceedings taken were not initiated by the defendant, but were taken by the police. Then it appears to have occurred to the police that it would be better to frame the information in a different way. The defendant did not go to the police and ask them to allow him to lay the information; the police came to the defendant and asked him to sign this fresh information, and then the proceedings went on against the plaintift upon the statements that the police had previously obtained from the several parties who knew something about the occurrence. Both Dowling and Wheatley were charged and committed for trial. Dowling was acquitted because the jury said they did not believe two of the witnesses that had been produced on the part of the prosecution, namely, Harn and Warren. The Crown Prosecutor, under those circumstances (I think very properly, as he only had similar evidence to produce against Wheatley as he had produced against Dowling), entered a *nolle prosequi*, and Wheatley was discharged. Wheatley thereupon brings this action for malicious prosecution. Now what were the facts that came to the knowledge of the defendant before he laid that information against Wheatley? He was first of all informed by Elliott that Wheatley was attempting to dispose of those diamonds. Wheatley went in the evening, first of all, and it was too dark then to deal with the diamonds, so he said he would come next day. He went the next day and he made the statements in answer to Elliott referred to, but upon being asked on whose behalf he was selling he refused to tell. He then said he had twelve diamonds, and when he subsequently only brought

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seven he was asked what had become of the other five, and he said his principal had sold them. That was an untruth. And he said he would have a great quantity more in a week or so that he would be able to sell. That, apparently, was untruthful too. Then the defendant ascertained that Harn had received these diamonds from Dowling. Although Harn's first answer to the question as to who brought him the diamonds was that he did not know the man, he went on to say that the man who would dispose of the diamonds was coming again in the evening, and that man who came in the evening was Dowling, and he not only came in the evening, but he entered the jeweller's shop by the back door. Now all this was known to the defendant. He also knew from Warren that Wheatley and Dowling had been seen on the occasion when Dowling was endeavouring to pass off these diamonds through Harn. He knew that they had been seen together both before and afterwards. He also knew through another witness (McKay) that Wheatley, on the Tuesday night, about eight o'clock, had gone to McKay's and said that if he (McKay) had any diamonds to dispose of he (Wheatley) knew where there was a market for them. The defendant knew that Wheatley was not a dealer in diamonds; he was an engine driver, he was a mechanic. The defendant further ascertained that the following morning these diamonds were in the hands of McKay for disposal. Wheatley goes at eight o'clock on the Tuesday evening to say that if there were any diamonds for sale he could find a market, and the next day the diamonds were forthcoming. Not only that, but he knew that there was a certain hurry over the proceedings. McKay went off at once with these diamonds to Wheatley's, where he saw Wheatley and his mate Festew, and so anxious was he about the disposal of these diamonds that he had Wheatley roused up out of his sleep. Wheatley then, not acting like a man who was indifferent as to the disposal of the diamonds or not, but acting, I think, rather precipitately—at any rate the defendant knew that he acted thus—started off at once to dispose of these diamonds. At five o'clock in the afternoon, although it is so late it won't do to wait till next day, he starts off at once by the next train and takes these diamonds to try and dispose of them, and then he makes those statements to which I have referred. Now this seems to me to amount to something more than a suspicion of Wheatley's being associated with Dowling with regard to those diamonds. The defendant knew

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that Dowling had opportunities previously of knowing where the diamonds that were stolen were kept, and then he had before him those very suspicious circumstances connected with Dowling's conduct in going to Harn in the way he did, and not only trying to dispose of the diamonds, but trying to dispose of them at a price very much under their value, and he knew that Wheatley and Dowling were not only friends, but that they were associated together that day. That seems to me to be evidence all pointing in the direction of a reasonable and probable cause for charging Wheatley, in conjunction with Dowling, with the offence with which they were charged. It is urged that it was incumbent upon the defendant to make enquiries, before instituting proceedings, as to the character of these various witnesses, but unless it was shewn that there was something suspicious about their character I do not see that any onus was thrown upon the defendant to enquire into the character of these witnesses. One of them at any rate (McKay) is given a character for honesty by his friend Wheatley, the plaintiff, and we find this honest friend of Wheatley's telling the defendant that Wheatley came to him not to purchase diamonds, as Wheatley afterwards said, or to get McKay to endeavour to get some diamonds for him, as he and his mate (Festew) were about to start diamond drilling, but that he simply came and said, "If you have any diamonds to dispose of I can find a market for them." What further enquiry should the defendant have made? I cannot myself see that he was called upon to make any enquiry. It is said that the jury disbelieved Harn and Warren, but with regard to that I have only again to repeat what was said by Mr. Justice Cave, in his summing up in the case of *Abrath* v. *The North Eastern Railway Company* (*a*). Indeed, it would be very hard upon the prosecutor if it were otherwise. Of course if a prosecutor goes and accepts evidence of those he knows are doubtful characters, and relies upon their statements, and he afterwards finds their statements are not accepted by the Magistrate, he only has himself to blame for relying altogether upon those statements. But even bad characters speak the truth frequently. We know that frequently we have to rely for the detection of crime upon men bearing bad characters, and frequently we have in the box truthful witnesses although they may be men of bad character. The observation of Justice Cave is this:—"I know that the material question for you

(*a*) Supra.

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to examine is whether the defendants in this particular case took reasonable care to inform themselves of the truth of the facts of the case. That, I think, is the first question you will have to ask yourselves, did they take reasonable care to inform themselves of the facts of the case, because if they took reasonable care to inform themselves, and are misled because people give false evidence . . . they cannot be said to have acted without reasonable and probable cause." In the House of Lords, in *Lister* v. *Perryman* (*a*), it was said, "If circumstances exist which might readily have been discovered by proper enquiry, and no enquiry at all has been made, that is evidence of want of reasonable and probable cause." Now I have said that the defendant adopted the proper course in putting the matter in the hands of the police, and waiting until the police obtained proper evidence of the charge before he made it, and he is not responsible for the jury happening to disbelieve two of the important witnesses who gave evidence in support of the charge. Although the jury disbelieved Harn and Warren, they could not have disbelieved what was proved conclusively, that Harn did say that he did not know the man who wanted to dispose of these diamonds, but that he would come there at six o'clock, and that Dowling did go there at six o'clock, and that he went in by the back door. The jury could not disbelieve those facts, because, apparently, they were undisputed. Now those are the facts upon which the defendant acted, and I must say I think they were abundantly reasonable and sufficient to lay this charge upon. I say nothing about the guilt or innocence of the accused, because that is not a question that comes before us for consideration, but there is certainly what, in my opinion, is reasonable ground upon these statements that the defendant had before him, and he was not bound, with those statements before him, to make further enquiry. I intended to have referred to the argument that he should have made further enquiries from McKay, because Festew told him that he was making a mistake in prosecuting Wheatley, that Wheatley was innocent, and that if Wheatley was guilty he (Festew) was equally guilty, and that if the defendant saw McKay, McKay would tell him all about it. Well, the defendant got McKay's statement in writing and he *did* know all about it before he laid the charge. He did not lay the charge without kowing what McKay was going to say, and what McKay

(*a*) L.R., 4, H.L., 521.

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ought to have said. McKay made a different statement in Court to the statement he made to the police, and to the statement he made to the defendant. The defendant is not to be held responsible for McKay going back on the statement he had previously made, and, therefore, he would have gained no further informatiou had he complied with Festew's request for him to go and ask McKay about what Wheatley had to do with this transaction. Then we come to the question of malice, whether he acted recklessly or from some indirect motive. I find it impossible to put my finger upon one tittle of evidence upon which one could infer, or upon which the jury would be justified in inferring, that the defendant was influenced by some indirect motive. In *Brown* v. *Hawkes* (*a*) the Master of the Rolls, in dealing with the evidence upon the question of malice, made use of this expression, " I cannot see any evidence in this case upon which one can fairly come to the conclusion that the defendant was guilty of the wicked act of accusing a man of a criminal offence, reckless of whether his accusation was true or false." That is my view of the evidence in this case. I cannot put my finger upon any evidence to shew that the defendant was reckless or whether this accusation was true. I have already expressed myself to that effect. The only piece of evidence relied upon to establish malice was the conversation with Festew. Now Festew was a friend of Wheatley's, he was a mate of his, and Festew had been unsuccessfully endeavouring to dispose of these diamonds and Festew was naturally interested in getting his mate out of the difficulty in which he apparently was, with this charge standing over him, so he goes to the defendant and tells the defendant that he has made a mistake and that Wheatley is no more guilty than he is, and that if he went to McKay, McKay would tell him all about it. The defendant had been to McKay and heard what McKay had to say, and he knew that McKay's statement, to say the least of it, was prejudicial to Wheatley, and he, therefore, replied, " Well, I intend to see it through." I think it was a very natural thing for him to say with all the evidence that he had got, that " notwithstanding that you, a friend of Wheatley's, and whom you have been also helping to dispose of these diamonds, say that if he is guilty you are equally guilty, I am still going on with this case." I cannot think that that is any evidence from which the jury can infer that the defendant was anxious to

(*a*) (1891) 2 Q.B., 718.

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prosecute the plaintiff whether he was guilty or innocent. For these reasons I am of opinion that this judgment should be set aside and judgment entered for the defendant, appellant.

HENSMAN, J. I will give my reasons shortly for differing from the judgment which has just been delivered by the Chief Justice. This is a motion by way of appeal from a judgment in favor of the plaintiff. It is to be borne in mind that this is not a question of whether there should be a new trial on the ground of misdirection, or that the verdict was against the weight of evidence. The main question is whether there was *any* evidence of the absence of reasonable and probable cause, or of malice, fit for the consideration of the jury. The action is for that the defendant falsely, maliciously and without reasonable and probable cause (which I will shortly put as "unreasonably"), made this charge against the plaintiff. As in these cases a man cannot bring an action unless he is able to shew that the proceedings have terminated in his favor, it must be assumed by the jury that the charge was false. The question, therefore, in the present case is, was there any evidence that the conduct of the defendant in prosecuting the plaintiff was unreasonable and malicious? First, was the conduct of the defendant such as a discreet and reasonable man would have pursued? It appears that in the first instance the plaintiff was charged before the Magistrates with receiving these diamonds, well knowing them to have been stolen. That was on the 8th June; but on the 12th June the charge was altered into one of stealing. The jury have found that the defendant did not prosecute on the first occasion, but that he did so on the charge of stealing. Now the only fact which could connect the plaintiff with the stealing of these diamonds was that of possession, because there was no evidence whatever that he was known to have had any connection with the diamonds until he was found in the possession of them at the beginning of June. I do not think that any case can be found in which the possession of articles, absolutely and easily portable, and which may be conveyed away and pass through many hands in a very short time, whether the possession of such articles two months and a half after they have been stolen, has ever been decided to be "recent possession." I asked during the argument if any such case had been found. No such authority was produced. Recent possession means possession so speedily after the felony that a presumption of guilt arises; and then the party is called upon

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to give an account of how he became possessed of the property stolen. If, however, the plaintiff was in recent possession, within the meaning of that expression in law, the next thing is—and this is an important matter to consider—did he make some statement, which was reasonable on the face of it, when he was charged. It seems that the plaintiff did make a statement to the police. The defendant made no enquiries of the police as to whether the plaintiff had made any statement. In my opinion he was acting unreasonably in proceeding to charge the plaintiff with larceny without knowing whether he had given any account of how he became possessed of the diamonds. Recent possession throws upon the party the necessity of giving such an account, and if it is reasonable a prudent and discreet man should pause and enquire further before he lays a charge of larceny. The question is generally left in some such form as it was in this case—"Did the defendant take reasonable and proper care to ascertain the facts, and did such facts justify him in making the charge?" The jury answered the question in the negative. That was a matter entirely for their consideration, and not for the Judge. It is said that there was no evidence upon which they could so find. I will shortly refer to a few of the facts which were in evidence. The plaintiff was a man of good character, well known in the neighbourhood. The plaintiff had been the first to inform the company of the loss of these diamonds in March. In June he took the stones openly to the manager, who was known to be an expert in diamonds. The manager himself gave evidence that he was an expert in precious stones, and it is common knowledge that an expert in stones can recognise them again. The plaintiff, if he had been a thief, might easily have sent the stones away to any distance, or have conveyed them away himself, but instead of doing that, the defendant knew that the plaintiff took them to the very place where he himself had originally given information as to their theft and where they would probably be recognised, as in fact they were. He stood out for the full price. The jury were entitled to take these matters into consideration. They were the judges of the credibility of the witnesses. There were circumstances which would have caused a reasonable and discreet man to make the fullest enquiries before he laid a charge of larceny. There is another point. If there was

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a reasonable suspicion of the plaintiff's guilt, all those who had dealt with the stones, four or five in number, within a few days previously had equal suspicion against them. The defendant was therefore acting on the evidence of apparent accomplices, without any independent corroboration. There was no enquiry as to these persons being credible witnesses. The jury at the trial in the Criminal Court would not believe either Warren or Harn, but the defendant acted on their statements; the statements of men who had as much suspicion of guilt against them, and more, than there was against the plaintiff. The only question, as I have said, is, was there any evidence? In my opinion there was evidence upon which a jury might well find as they did. The next question is, was there any evidence of malice? It has been laid down again and again that malice may be inferred from the absence of reasonable cause; but I think in this case there was much more than that. The evidence is that on the 8th June Festew met the defendant and said, "You are making a great mistake; Wheatley is no more guilty than you are," and he further told the defendant that if he saw McKay he could tell him all about it, to which the defendant replied, "I will see it through now." Now, with great respect to the Chief Justice, my opinion is that that expression is quite capable of shewing a determination to go on with the prosecution at all hazards, in other words an absence of an honest desire to bring a criminal to justice. It was for the jury to say what the words meant. It is said that their finding does not impart malice. The question put to them was, "Was the charge made in the honest belief in its truth, or was it made recklessly, or from anger, or from some indirect motive." The jury found that the charge was made either recklessly or from some indirect motive. If there is not an honest desire to bring a criminal to justice, if there is some indirect motive (whatever it may be) then that is, in the eyes of the law, malice; and this is the clear and obvious finding of the jury. I need not touch on the point that the question of want of reasonable and probable cause should have been decided by the Judge, and not by the jury, because after the jury had found on the facts that reasonable enquiry was not made, I did, as a fact, at the request of counsel, decide that there was an absence of reasonable and probable cause. If this had been a motion for a new trial, other points might

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have been raised upon which it is unnecessary to say anything now. On this motion, however, I am of opinion that the Court has no right to ignore or disturb the findings of the jury and to enter judgment for the defendant. The result is a trial by Judges, not by a jury.

PARKER, J. I need only say that I concur in the judgment delivered by the learned Chief Justice.

Appeal allowed with costs.

Solicitors for appellant: *Stawell & Cowle.*

Solicitor for respondent: *A. F. Abbott.*

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WHITCHURCH, PLAINTIFF (RESPONDENT).
THE COMMISSIONER OF RAILWAYS, DEFENDANT (APPELLANT).

1901.
Dec. 21.
The C. J.
Hensman, J.

Negligence—Liability—Government Railways—Injury to passengers—Effect of disregard of Notices put up in carriages requesting passengers not to ride on platforms—Trespasser—Contributory negligence of plaintiff—Defendant's liability, notwithstanding plaintiff's contributory negligence.

The W.A. Government Railway, between Boulder and Kalgoorlie, used carriages on the American car system, with doors at each end, the doors being approached by a platform which is enclosed by an iron railing with gates on either side, through which passengers enter and alight. The following notice is on the carriage doors:—"Passengers are requested not to ride on the platform." The notice had not been insisted on, and had been, for many months, continually disregarded by the public, and the Government servants had not interfered to enforce the observance of it. Evidence showed it was the guard's duty to close the gates while travelling. Plaintiff was a passenger from Boulder to Kalgoorlie by one of these trains. On boarding the train he stood on the platform and paid his fare while standing on the platform. During the journey the carriage lurched and plaintiff was thrown off his balance, and the gate having been left open by the guard, he fell through on to the permanent way and was severely injured.

Held, that plaintiff was not a trespasser by being on the platform, inasmuch as defendant had reason to believe that the platform would be used by passengers because they were constantly in the habit of so doing without interference from the guard in charge. And also it was the duty of the guard in charge to shut the gates, and that being the case, the defendant was guilty of negligence.

Held, further, that even if the jury find the plaintiff guilty of contributory negligence, and also find that the defendant could, by the exercise of ordinary care and cautiou, have avoided the accident, the plaintiff is entitled to recover, the question being "whether reasonable men could have so found," and in this regard the Court bears in mind that the jury who have heard all the evidence and know the facts are better able to judge.

Held, further, that if an act of negligence on the part of the plaintiff, the defendant has the opportunity and the time to do some other act which will prevent injury resulting to the plaintiff from the consequence of such act on his part, and the defendant neglects to do such preventative act, he is liable. *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (*a*), considered and followed.

Appeal by the defendant from the verdict of a jury on a trial at Kalgoorlie before a Judge and jury on a commission, for damages for personal injuries caused by the negligence of the defendant.

The negligence complained of more fully appears in the headnote and the judgments. The jury found for the plaintiff £1,086 17s., and judgment was entered up accordingly.

The defendant appealed, and also moved for a new trial on several grounds, but the following were the only grounds insisted upon, on the motion, viz:—1. The verdict was contrary to the evidence, and to the direction of the learned Judge and perverse. 2. Verdict against weight of evidence. 3. Misdirection.

The appellants abandoned their appeal and relied on the motion for a new trial.

(*a*) 3 App. Cas., 1155.

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Burt, K.C. (with him *Keenan*), for appellant. The plaintiff was a trespasser, he had no right on the platform. There was a notice on the doors of the carriages that passengers were not allowed on platforms. The defendant had a full knowledge of the danger and he knew that the gate was open after the train started. There was no duty on defendant to close the gates. Passengers had no right to ride on these platforms. The jury were wrong and perverse in finding that the plaintiff was not guilty of negligence in going on to and standing on the platform; plaintiff knew the gates were always open and did not use reasonable care in going on a place he knew, or must have kown, was dangerous. As to plaintiff being a trespasser, counsel cited *Dublin Wicklow and Wexford Railway Company* v. *Slattery* (*a*). The evidence was conclusive on the question that the carriage had ample room inside when the plaintiff got on the platform. Had the carriage been over-crowed, and had plaintiff no time to get off before the train started, the finding of the jury might have been a reasonable one, but, as the facts appear, the finding is unreasonable, perverse, and against the weight of evidence. The Judge misdirected the jury as to the effect of the evidence, and as to the duty of passengers to take proper precautions, and as to the contributory negligence of the plaintiff.

Villeneuve Smith, for respondent. *Dublin Wicklow and Wexford Railway Company* v. *Slattery* is no authority for the contention raised as to the plaintiff being a trespasser. The custom obtaining as to passengers travelling on platforms became in fact a license, and being so, there was no trespass, and moreover Slattery's case decides that :—" Where notices by a Railway Company had been continually disregarded by the public, and the Company's servants had not interfered to enforce them, the Company cannot set up the existence of the notices, by way of answer, in an action for damages." It is, therefore, a direct authority for the plaintiff, assuming the notices were on the carriages, and the plaintiff saw or ought to have seen them. It was the clear duty of the guard to close the gates on the signal being given to start. The gates are the real means of access to the platforms or carriages, as the case may be, on the Boulder line. The system is bad, *Smith* v. *Baker* (*b*), *Thomas* v. *G. W. Colliery Company* (*c*), and *Gee* v. *Metropolitan Railway Company* (*d*). The Judge's summing up was absolutely

(*a*) 3 App. Cas., 1155.
(*b*) 1891, App. Cas., 325.
(*c*) 10 Times L.R., 244.
(*d*) 1873, 8 L.R.Q.B., 161.

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correct and fair both ways. There was no misdirection. He put everything to the jury. *Lambkin* v. *S. E. Railway Company* (*a*). Whether plaintiff was compelled to stand on platform or not is beside the question. He had a right to be there by reason of the custom, and he was never warned. As to the plaintiff's knowledge of danger the jury had all the facts before them, and it must be proved that he had a *full* knowledge of the danger he was incurring, and the nature and extent thereof. This lies on the defendant, and no such proof was offered or adduced. *Osborne* v. *L. & N. W. Railway Company* (*b*). As to weight of evidence counsel cited, *Metropolitan Railway Company* v. *Wright* (*c*), and *Council of Municipality of Brisbane* v. *Martin* (*d*), *Commissioner of Railways* v. *Brown* (*e*), also *Brown and Others* v. *Commissioner of Railways* (*f*).

STONE, C. J. This was an action at common law by the plaintiff against the Commissioner of Railways to recover damages for negligence whereby the plaintiff when travelling as a passenger on the Boulder railway received serious injuries which resulted in the amputation of one of his legs. The case was tried before Mr. Justice Parker and a jury, and the questions, as put to the jury by the learned Judge, together with the findings thereon, were as follows :— 1. Was the defendant negligent in not keeping the gates on the car platforms closed whilst the train was in motion ?—Yes. 2. Was the plaintiff compelled to stand on the platform by reason of the car being over crowded, or by reason of the train being over crowded ?—No. 3. Did the train lurch heavily, or more than ordinarily when the accident occurred ?—No. 4. Was the plaintiff negligent in going and standing upon the platform of the car whilst the train was in motion ?—No. 5. If the defendant and plaintiff were both negligent, could the defendant by the exercise of ordinary care and caution have avoided the accident ? —Yes. 6. Did the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran when he went on the platform impliedly elect to incur it ?—No. Upon these findings and the verdict entered upon them the defendant applies for a new trial, upon the ground that the verdict was contrary to the evidence and to the direction of the learned Judge, and perverse. There was no finding of the jury that the injuries sustained by the plaintiff

(*a*) 5 App. Cas., 352.
(*b*) 21 Q.B.D., 220.
(*c*) 11 App. Cas., p. 152.
(*d*) 1894, App. Cas., p. 249.
(*e*) 13 App. Cas., 133.
(*f*) 15 App. Cas., 240.

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were the result of the accident. The appellants also say that the verdict was against the weight of evidence, and that the learned Judge misdirected the jury as to the circumstance of the defendants leaving the gates of the platform of the car open being a circumstance from which they might infer negligence on his part. The second and last grounds have not been pressed, and therefore I need not deal with them. It appears that the plaintiff, upon the occasion of receiving his injury was travelling in the Boulder train. The carriage in which he was travelling was similar to a tramway carriage, that is it had a place assigned for passengers in the carriage and it also had a place at either end by which the passengers gained access to the carriage, and also egress from the carriage, but there is this distinction with regard to this place on the railway car from the similar place on a tramway car, that in the latter the place is allowed to be occupied by a certain number of passengers, whereas the platform of the railway carriage is not so allowed to be occupied. It would, however, appear from the evidence that upon this particular railway passengers have frequently been allowed to occupy this place. It seems to have been against the will of the guard and those in charge of the train, who did their utmost to stop this practice. From the evidence, however, it appears that on several occasions the platforms have been so crowded that the guards have been hustled, indeed assaulted, in their attempts to get the passengers to remove from the platform. On several occasions, however, the evidence shews that no attempt was made in this direction; indeed, the reverse position has been taken up by the guard, because they have collected tickets from the passengers standing upon the platform. On the particular occasion in question the plaintiff occupied the platform, and his ticket was collected from him by the person authorised to do so. There was a notice over the door of the carriage to the effect that persons were warned from being upon the platform, but the plaintiff, according to his evidence, did not see this notice, nor was his attention drawn to it. He had previously occupied another carriage, but for the purpose of convenience he had got out of that carriage and got on to this particular platform, walking through the carriage from the rear platform. He had full knowledge at the time he entered this carriage and went on the platform that the gates were open; indeed, according to his own evidence, the gates were as often open as closed, and he said in his evidence that the gates were

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open, although when he got on the platform from which he fell he said he could not see the gates because there were two people, the guard and another passenger, standing just at the opening. Directly he got on to the platform he stooped and put down a parcel that he had in his hand, and it does not appear that when he stooped that had hold of any portion of the railing of the platform. He said he had no sooner stooped than there was a jolting of the train and he was thrown forcibly in the direction of the gate opening, and, although an attempt was made to save him by the guard and passenger, he fell through the opening and the train went over his foot, crushing it, which necessitated the subsequent amputation of the limb. Now, it has been urged before us that the plaintiff was unlawfully upon the platform upon this occasion, and that if that was so, there was no duty cast upon the Govornment to protect him in any way by closing the gates. If this was so—if I could come to the conclusion that the plaintiff was unlawfully upon the platform —I think I should have to agree with that contention, because it appears to me that the decision in the case of *The Dublin Wicklow and Wexford Railway Company* v. *Slattery* (*a*) is an authority to that proposition. Lord Selborne, in giving judgment in that case, which was for damages for injuries received by a man crossing a railway line, said, "If the man was injured while crossing the line . . . if the deceased had been a mere trespasser on the line, it would have been his own fault if he was in the way of danger . . . the defendant would be under no special obligation to give warning," and that view was supported by the other learned Judge, who said he did not think the plaintiff was a trespasser in the sense that the Company could have maintained an action against him for crossing the line. Now, in the case before us, the person in charge of the train had reason to anticipate that the platform would be used by passengers, and therefore, irrespective of the evidence, he had reason to anticipate that persons would be occupying the platform because they were constantly in the habit of doing so, and doing so without interference from the guard in charge of the train. Not only had they reason to anticipate that passengers would be on the platform, but according to the evidence of the two guards it was their duty to shut the gates. Both Leach and Perks said it was their duty to shut the gates, and it seems to me, bearing in mind that these officers had full knowledge that the platforms were

(*a*) 3 App. Cas. 1155.

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constantly occupied by passengers, and also that it was their duty to shut the gates, I cannot but come to the conclusion that on the question of trespass or unlawful occupation there is a distinction between the circumstances of the present case and that of *The Dublin Railways* v. *Slattery*, and that therefore the dictum or decision of the Judges in that case cannot be applied to the circumstances of the present case. I am therefore of opinion with regard to the charge of negligence against the Government for allowing these gates to be open, and the finding of the jury upon that issue, that no fault can be found with the verdict upon that ground. Then we must consider whether the verdict, with regard to this question of negligence was against the weight of evidence. I cannot say so. The evidence was very clear with regard to the eircumstances to which I have referred, and the learned Judge pointed out very fully the issues which the jury had to decide upon this question, and the evidence on the matter. The learned Judge left the question very clearly to the jury, and the jury have found, upon the evidence, that the defendant was negligent in not keeping the gates shut upon this occasion. The next question to which the motion applies is whether the finding of the jury that the plaintiff was not negligent in going and standing upon the platform of the car whilst it was in motion, is against the weight of evidence. After a very careful consideration of the evidence dealing with that issue I have come to the conclusion that the jury could not reasonably find to that effect. It seems to me clear from the plaintiff's own admission that he knew that the gates opening on to these platforms were as often open as closed; he knew upon this particular occasion that the gates were open. Although there was a conflict of evidence as to whether there was seating accommodation in the car or not—and I therefore am unable to form an opinion on that, still in my opinion there was no necessity for the plaintiff to have gone on the platform, because at any rate there was standing room—the jury found that the plaintiff was not compelled to stand on the platform by reason of the train being overcrowded. Therefore he went there freely, of his own accord and not from necessity, and that being so I think it could not for one moment be held that he acted as a wise and discreet man in going upon that platform and stooping down without protecting himself in some way by taking hold of something. He knew that he was in the vicinity of a place where the train

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crossed the points, and as a frequent passenger on the railway he knew that the train bumped when crossing these points, and it was in consequence of the train bumping while he was in this position, and not having hold of anything that he was thrown out and injured. It seems to me that there was evidence of negligence on his part upon his own admission. But the jury were asked another question, and the learned Judge left the issue arising out of that question to them, very fully pointing out the evidence of the guard on the one hand and that of the plaintiff on the other. No objection has been taken to the direction of the the learned Judge with regard to that issue, and therefore I must take it that his direction was correct. The question left to the jury was, if the defendant and plaintiff were both negligent, could the defendant, by the exercise of ordinary care and caution, have avoided the accident? Upon that question I have had some difficulty in coming to a conclusion, but as the learned judge left the evidence very fully to the jury, and explained to them the nature of the issue which they had to deal with, and as no objection has been taken to that direction, I cannot go so far as to say that, with the evidence before them, the jury acted unreasonably in answering that question in the affirmative; I can only go this far and say that, had I been trying the case I should certainly not have come to that conclusion. However, I am not putting myself in the place of the jury. They had the evidence before them, entirely for their consideration, and unless upon a review of the evidence I can come to the conclusion that the findings were such as reasonable men ought not to have found, I have no right to interfere with their verdict. The plaintiff says he went on the platform and was stooping down, and that immediately he stooped the train lurched and he was shot through the gateway. Now it is said that the defendant could have prevented that by shutting the gates, and the jury have come to the conclusion that they could. I find it difficult to agree with the jury there, that there was time to shut the gates considering the positions that the parties were in. The act of the plaintiff stooping, the jolt and his being thrown through the gateway, seem to have been almost simultaneous; he seems to have been close to the guard and the passenger, and to have nearly thrown them out as well as himself, and, therefore, I cannot see how the guard, without great risk to his own life, could have shut the gate in time

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to have prevented the plaintiff from being shot through. This, however, is only expressing my own views, and the jury, upon the evidence, are quite entitled to their view, although it differs from mine, and I cannot say that they were unreasonable in expressing that opinion, and am, therefore, unable to reverse the verdict on that point. The finding with regard to the plaintiff taking upon himself the risk was not pressed, and, therefore, I need not deal with it. Now with regard to the objection that the learned Judge misdirected the jury as to the circumstances of the defendant leaving the gates open being a circumstance from which they could find negligence, I am unable to see any misdirection. The learned Judge pointed out to the jury that the plaintiff knew these gates were open, and that, notwithstanding any objections raised from time to time by the guard to persons travelling on the platform, there was evidence which would lead the jury to the conclusion that it was the bounden duty of the Crown to guard against the risk of persons going on the platform. It, therefore, seems to me that the Judge put the question with equal fairness to both sides. His Honor used these words:—"We have, I think, before us evidence that will bring you to the conclusion that it was the bounden duty of the Commissioner to guard against the risk of danger incurred by persons coming upon the platforms of these cars. Therefore, gentlemen, I do not think you will have much difficulty in answering the first question. You will bear in mind . . . . . The evidence that has been given with respect to the doors and gates being open is only given to confirm the story of the plaintiff that they were open on this occasion, and if you are satisfied that the doors leading into and from the cars were open, and that the gates of the platform were also open, then, I think, you will have very little difficulty in coming to the conclusion that the defendant was guilty of negligence." I can see no objection to that direction. Under the circumstances I think the learned Judge was right, because there was evidence that this platform was constantly occupied by passengers with the acquiescence of the guard, and upon this particular occasion the plaintiff not only occupied the platform to the knowledge of the guard, but his ticket was collected whilst he was on the platform, and the further fact that the two guards stated it was their duty to close the gate. That being so, I think the learned Judge was correct in telling the jury that they would have very little difficulty under these circumstances, if they

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believed these facts, in coming to a conclusion that the defendant was guilty of negligence. For these reasons I am of opinion that the application for a new trial should be dismissed.

HENSMAN, J. I am of the same opinion. With regard to the question of misdirection by the learned Judge as to the facts of the gates being left open being a circumstance from which the jury ought to infer negligence, I can see no misdirection, but on the contrary think it was a proper direction. To leave gates upon a carriage of this kind open must always be unsafe. It must be borne in mind that the railway carries all sorts of people, old and young, careful and careless. We have the fact also, that although a notice had been put up warning passengers, yet they had been constantly allowed to travel on the platform, and had even had their tickets given them there by the guard. Furthermore there is a strong piece of evidence that although there was a notice over the door, none of the witnesses called upon the part of the plaintiff had ever seen that notice, and still stronger there was the evidence of the two guards who said it was their duty to shut the gates. That being so I am of opinion there was no misdirection upon that point. Now we must consider whether the finding on the other points were contrary to the direction of the Judge and perverse. I am of opinion they were neither contrary to the direction of the learned Judge or perverse in the sense of disobeying any direction of the Judge, because the evidence in the case shews that all these questions were left to the jury for them to decide. Therefore the only other question is, whether the findings in favor of the plaintiff were against the weight of evidence, and it is to be borne in mind upon this point that the jury did not find all the issues in favor of the plaintiff, but found some of them for the defendant, shewing at all events that they were a jury capable of distinguishing a case and weighing the evidence. Now before I deal shortly with each of these findings I must observe that all the questions left to the jury were framed with the consent of counsel at the trial, and furthermore no suggestion was made at the trial that there was no evidence to go to the jury on these points—there was no motion to enter judgment for the defendant, nor was there any motion to withdraw any particular questions from the jury. Therefore, with regard to the first finding that there was negligence by the defendant I agree with what has been said, that there was clear evidence upon that

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point. If the gates had been shut no accident would have happened, and there was evidence that it was the duty of the defendant to shut the gates. With regard to the question of contributory negligence by the plaintiff I am not disposed to disagree with what has been said by the learned Chief Justice. The plaintiff knew or ought to have known as a reasonable man that the gate was open, and he ought to have known that it would be unsafe to stand there. He went there and therefore I am of opinion that the jury were wrong in their finding on that point. But then we come to the question of whether the defendant could have avoided the accident by the exercise of ordinary care and caution. The jury answered that in the affirmative. With regard to this issue the learned Judge summed up at considerable length, and he read the evidence fully to the jury, and the question being left to them they found in favor of the plaintiff. Again after the learned Judge had finished his summing up his attention seems to have been drawn by one of the counsel to this important point, when he said, "You will consider what I have said in connection with that; firstly, could the guard have shut the gates; and secondly, did he attempt to do so before the accident occurred. If you come to the conclusion that he could, you will then answer in the affirmative." I have read this to shew that in the opinion of the learned Judge it was a fair issue to leave to the jury. It is not a question whether I should have found the same verdict, and I do not think it necessary to express an opinion upon that point; the question is whether reasonable men could have so found. In this regard we should bear in mind that the jury are better able to judge than we are here where we do not hear the evidence, and they knew all the facts in connection with the matter, and this being a trial by jury it appears to me that it was a fair issue to put to them. The rule of law is that where the matter is put fairly and fully before a jury the Court will not interfere with their findings. I am of opinion the appeal should be dismissed.

Solicitor for appellant: *Crown Solicitor.*

Solicitors for respondent: *Jones, Smith & Norris.*

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1902.

April 21.

The C. J.
Hensman, J.
Parker, J.

THE CITY OF YORK COMPANY, LTD., PLAINTIFFS (APPELLANTS).

THE CROWN, DEFENDANT (RESPONDENT).

Crown Suits Act, 1898 (62 *Vic.*, *No.* 9)—*Negligence of servant of Government—Authorised act of servant—Section* 33, *S.S.* 3 *of Act—"Public work"—Damage suffered in connection with a "public work"—"Flare-up" Signal—Lighthouse—Pilot boat.*

Appeal from the decision of Stone, C.J., upon the points of law raised by paragraph 9 of a petition under the Crown Suits Act, 1898, which had been ordered by a Judge in Chambers to be disposed of before the trial of the issues of fact in the action. The facts upon which the petition was based were as follows:—A ship was approaching the Island of Rottnest, where there is a Government lighthouse and lighthouse keeper. It was usual for certain signals to be used by pilots who might have to guide ships into the harbour, and a signal known as a "flare-up" was used as a warning to ships that the pilot was in safe water and that the ship might safely approach in the direction of the light. Upon the occasion in question the lighthouse keeper gave the "flare-up" signal at the foot of the lighthouse, and did so with the sanction and by the direction of the Executive Government. The ship saw this signal and came on, under the impression that it was the usual pilot signal, the consequence being that she was subsequently lost in the vicinity of Rottnest. Paragraph 9 of the petition was as follows:—"The said 'flare-up' signals were wrongfully, carelessly, negligently and improperly given by Her late Majesty's Executive Government in Western Australia by its servant the said keeper of the lighthouse to the master of the said ship, and were calculated to mislead, and did in fact mislead, and cause the said master of the said ship to believe that the dangerous water into which he sailed the said ship was safe, and the master being wholly ignorant of the danger he was incurring. That Her late Majesty's Executive Government in Western Australia sanctioned, authorised and directed the said signals given by its servant the lighthouse keeper aforesaid."

Held, that the lighthouse was a public work within the meaning of Section 33 of the Crown Suits Act, and that the "flare-up" signals were used in connection with the lighthouse and were intended as a warning to ships, and, therefore, the wrong or damage sustained by the plaintiff did arise in connection with the lighthouse, and assuming the facts stated in the petition to be true, the defendant having sanctioned and directed wrong and misleading lights to be used at the lighthouse—which were the direct cause of the damage complained of—the petition does disclose a Cause of Action under the Crown Suits Act, 1898.

Sayer (with him *Barsden*), for the appellants. The signal used was a wrong one because it was a signal meaning a pilot was there in safe water, which was not the fact, and was negligently exhibited, and the Crown sanctioned, authorised and directed the signal given by its servant the lighthouse keeper. The lighthouse keeper was a public servant and gave the signal from the bottom of the lighthouse, *i.e.*, in connection with a public work, a building (the lighthouse) constructed by the Government of the Colony, and the revenues derived from which form part of the Consolidated

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Revenue of the Colony, 62 Vic., No. 9, Section 33, Sub-sections 2 and 3. In consequence of this signal the ship, "The City of York," was totally lost. The Crown is in the same position as the Trinity Corporation in England in like circumstances, and damages have been recovered against it for injuries due to the negligence of a lighthouse keeper. *Gilbert* v. *The Corporation of Trinity House* (*a*). No duty other than to exhibit a light in the lighthouse was cast on the Crown, but it voluntarily exhibited the signal complained of. The principle is a well-known one, that if a person undertake to perform a voluntary act he is liable if he perform it improperly, but not if he neglect to perform it. Here the Crown having exhibited lights it was under no duty to exhibit, are liable for negligence. *Coggs* v. *Bernard* (*b*), and see Wills, J., in *Skelton* v. *L. and N.W. Railway Company* (*c*).

Barsden (on same side). The Crown Suits Act, 1898, Section 33, gives the right to the subject to sue the Crown in an action founded upon certain causes, and was intended to extend the rights of the subject and to meet the dangers attendant upon the carrying on by the Crown of certain business enterprises, of which the establishment of lighthouses forms one, and further by the concluding words of Sub-section 4 of the same Section this is a Statute dealing with the finances, and should be, therefore, liberally construed.

Burt, K.C. (with him *Leake*, K.C.), for respondent. Section 33 of the Crown Suits Act, 1898, was passed to limit the remedy of the subject against the Crown not to extend it as contended. Compare the New Zealand Crown Suits Act, 1881, which contains a similar Clause to Section 33. The question is whether the public work, if the lighthouse be a public work, was used or not. The lighthouse is a building, and the petition says, "or is used in connection with public works," (paragraph 4). There is nothing in the Section that a building or a work may be used in connection with other public works. Unless the public work be used by itself to the detriment of the subject the case fails. The signal made by the lighthouse keeper cannot be said to have been done in connection with a public work, it was the act of the lighthouse keeper. The signal had nothing to do with the lighthouse, but all to do with the pilot boat, and the pilot boat is not a public work and the signal made was not

(*a*) 17 Q.B.D., 795. (*b*) 2 Ld. Ray, 909.
(*c*) L.R., 2 C.P., 631.

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made in connection with the boat. No duty was cast upon the lighthouse keeper with respect to these signals.

HENSMAN, J. The case for the plaintiff is that this misleading act was done under the authority of the Government. Assuming this to be the case do you still say there is no remedy?

Burt, K.C. There is no remedy. The "flare-up" signal had nothing to do with the lighthouse or with the duties of the keeper, and is not, therefore, according to the judgment appealed from, within the meaning of the words "used in connection with a public work."

Leake, K.C. (on the same side). A public work means something concrete. A pilot boat and a lighthouse represent a system of public service from which revenue is derived. The revenue in respect to lights is derived from this system, including harbour lights, tonnage, dues, etc., and it cannot be said that the revenue is derived in respect of one lighthouse or all the lighthouses, and when the Act speaks of a public work, and a wrong done in connection therewith, it contemplates something concrete and not a wrong done in connection with a system. The Crown Suits Act, 1898, was passed, expressly to limit the right of the subject, and a strict construction should be placed upon it as it limits the prerogative. The appellants may have a remedy against the lighthouse keeper for lighting a wrong signal, but it does not follow that a remedy lies against the Crown. If the signal was used in connection with anything it was in connection with the pilot boat, and the pilot boat is not a public work.

Sayer, in reply. There is sufficient on the face of the petition to allege negligence done in connection with the lighthouse.

HENSMAN, J., delivered the judgment of the Court. This is an action against the Government under the Crown Suits Act of 1898. The petitioners allege that their ship the "City of York" was approaching the island of Rottnest on the night of the 12th of July, 1899, bound for Fremantle. It is the custom for ships to take up a pilot when near Rottnest, and "flare-up" signals are used at night on the pilot boats to indicate that the ship may approach the pilot in safe water. The petitioners state that on the night in question the keeper of the lighthouse at Rottnest (who is a servant of the Government) signalled to the ship

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by giving a succession of "flare-up" signals from the bottom of the lighthouse which were replied to in the customary manner by the burning of blue lights on board the ship. The ship proceeded towards the "flare-up" signals until she got so near to the Island that she struck upon the rocks and became a total wreck. It is alleged that these signals were wrongfully and negligently given by the keeper of the lighthouse, that they misled the master of the ship into the belief that he was sailing into safe water, and further that they were given by the lighthouse keeper by the sanction, authority, and direction of the Government. The defendants, in addition to denying the material statements of the petition and pleading the contributory negligence of the captain, objected that the petition disclosed no cause of action against the Government. By a Judge's order of August, 1901, it was ordered that this point of law should be argued before the trial of the issues of fact. This was done, and upon the argument the Chief Justice dismissed the petition with costs. This is an appeal from that decision. The section of the Act which bears upon this question is Section 33, which says that an action may be brought against the Crown for "a wrong or damage independent of contract done or suffered in or upon or in connection with a public work as in the Act defined." The learned Judge was of opinion that this lighthouse is a public work within the meaning of the Act, and I entirely agree with that view. His Honor however decided against the petitioners on the ground that the wrong or damage sustained by them did not arise "in connection with the lighthouse." With that decision I am unable to agree. In my opinion the "flare-up" signals were clearly used in connection with the lighthouse; not only as a fact, being exhibited at the bottom of the light-house, but the keeper used them and intended them to be understood by the ship as warning lights. In the course of his employment, he used wrong lights. He intended them as a warning of land or of danger, in other words as lighthouse lights, but he negligently and improperly exhibited lights which led to the destruction of the ship. It is to be borne in mind that this point of law must be treated as if it had been raised by the old form of demurrer. The Court is bound therefore for the purposes of this argument to assume the truth of all the allegations of the petition. That being so it must be taken as admitted on this appeal that the Government sanctioned and directed wrong and misleading lights to be used at this lighthouse

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which were the direct and immediate cause of the damage complained of. Upon these grounds I am of opinion that this appeal should be allowed with costs. The Chief Justice has asked me to say that upon further consideration he has arrived at the same conclusion.

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Solicitors for appellants: *Moss & Barsden.*

Solicitor for respondent: *Crown Solicitor.*

PERKINS, PLAINTIFF (APPELLANT).

BOYLEN & ANTILL, DEFENDANTS (RESPONDENTS).

1902.

April 23.

Hensman, J.
Parker, J.
Moorhead, J.

Arbitration—Award—Evidence—Pleading award—Estoppel.

Appeal from a judgment of the Chief Justice on the findings of a jury.

The plaintiff and defendants were stock brokers. The plaintiff alleged that he had ordered, and that the defendants had agreed to purchase for him, 1,000 shares in a gold mining company; that the defendants bought the 1,000 shares, but afterwards, on such shares rising in the market, converted 700 of them to their own use and informed the plaintiff that they had only been able to purchase 300, and delivered 300 accordingly to the plaintiff; plaintiff further alleged that he became aware of this conduct on the defendants' part only after a considerable time. The defendants denied these allegations, and while admitting that they had purchased 1,000 shares, stated that the plaintiff had only ordered 300 which they had duly delivered to him. On the above issues the parties agreed to refer the whole matters in dispute to two stock brokers as arbitrators. The arbitrators entered upon their enquiry and found that only 300 shares had been ordered by plaintiff.

During the inquiry by the arbitrators a question of evidence arose as to whether certain missing folios in the defendants' letter book, which plaintiff alleged contained press copies of certain letters written by defendants to him in reference to the said shares, had been destroyed intentionally by the defendants. The plaintiff did not produce these original letters which he alleged defendants had written to him, stating that he had lost them, and the arbitrators in their report or award declined to give any opinion on this point; notwithstanding the award, the plaintiff brought this action for the value of the difference between 300 and 1,000 shares. The defendants pleaded *inter alia* the award.

At the trial the jury found in favor of the plaintiff on his claim, and they also found for the defendants on their plea of an award. On these findings the Judge directed judgment to be entered for the defendants on the ground that the second finding was a complete answer to the plaintiff's claim. Against this judgment the plaintiff appealed.

Held, that the judgment, as entered by the Judge, was correct, and that the report of the arbitrators was a good award, notwithstanding that it was only addressed to the plaintiff.

Held further, that as the question of the missing folios only arose during the inquiry, it was not a matter in dispute which had been submitted to the arbitrators, but simply a piece of evidence arising incidentally during the inquiry and upon which the arbitrators declined to give an opinion either way; and that they had sufficient evidence, before them irrespective of the missing folios, to arrive at the conclusion they did.

On Appeal.

Pilkington, for the appellant. The document relied upon is not

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an award. It is as follows:—"Hector Perkins, Esq., Dear Sir, In response to your request that we should thoroughly investigate your Brownhill Extended transaction with Messrs. Boylen & Antill we beg to state that we have examined all details and received every facility from the firm in question, and we now beg to submit our report. We have thoroughly investigated the Brownhill transaction, Messrs. Boylen & Antill have shewn us all the books; you intimated at the first meeting that you would shew us at the next sitting that you had ordered 1,000 shares, but you have not done so, although you led us to believe that you had something that will prove your claim. As you have not produced this evidence we can only decide without it. Everything with regard to the 300 shares bought on your account is absolutely in order and there is nothing to shew that you ordered more than this number; therefore we can only come to one conclusion, and that is, that only 300 shares were ordered, and further, from documentary evidence, we also find that there was no delay in executing your order of 1st June. With regard to the missing folios in the letter book, we find that the index has been carelessly kept, therefore, we cannot give any opinion on this fact." The above document does not decide all the questions referred; the arbitrators declined to decide the question of the missing folios. An award must be clearly expressed and must be a final determination of all matters submitted, and, therefore, in declining to decide the question of the missing folios, the arbitrators refused or neglected to decide all matters submitted, and that being so the award is bad. Cited *Lock Vulliamy* (*a*), *Matson* v. *Trower* (*b*), *Wakefield* v. *Llanelly Railway and Dock Company* (*c*), *In re Tribe & Upperton* (*d*).

Villeneuve Smith (*Hensman* with him), for respondents were not called upon.

HENSMAN, J. In this case I am of opinion that the learned Judge was right in holding that the document in question was an award. It has been argued, and rightly so, that an award must be certain, final, and deal with all the matters referred. Before this action was brought, an arbitration took place, initiated at the request of the plaintiff. Two gentlemen, stockbrokers (this being a share transaction), were appointed to examine into and decide the case in

(*a*) 5 B. & A., 600.
(*b*) 27 Rev. Rep., 725.
(*c*) 12 L.T. 509.
(*d*) 3 A. & E., 295.

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order to avoid legal proceedings. The award is addressed to the plaintiff, but that is not important. It says, "In response to your request that we should thoroughly investigate your Brownhill Extended transactions with Messrs. Boylen & Antill we beg to state that we have examined all details and received every facility from the firm in question and now beg to submit our report." The matter to be investigated was the Brownhill transactions between the plaintiff and the defendants. The plaintiff alleged that he instructed the defendants to buy 1,000 shares for him. The defendants gave him 300 shares only, and the question in dispute was whether 1,000 shares were undertaken to be bought or only 300. The arbitrators further said, "We have thoroughly investigated the Brownhill transaction . . . Messrs. Boylen & Antill have shewn us all their books. You intimated at the first meeting that you would shew us at the next sitting that you ordered 1,000 shares, but you have not done so although you have led us to believe that you had something that will prove your claim." It has been argued that the words "will prove your claim" shew or tend to shew that this was not a final decision. I cannot agree with that view. It seems to me that the word "will" was used by mistake for "would have," and that the sentence was intended to read, "you led us to believe that you had something that would have proved your claim." The document continues, "As you have not produced this evidence we can only decide without it." That is the case in all trials—if a party says he has evidence, but cannot or does not produce it he must take the consequences. Then the document goes on "Everything with regard to the 300 shares bought on your account is absolutely in order and there is nothing to shew that you ordered more than this number. Therefore we can only come to the one conclusion and that is that only 300 shares were ordered, and further, from the documentary evidence we also find that there was no delay in executing your order of the 1st of June." The words "we can only come to one conclusion that only 300 shares were ordered," in my opinion shew a final decision. We come now to another point. The arbitrators say "With regard to the missing folios in the letter book, we find that the index has been carelessly kept, therefore we cannot give any opinion on this fact." Having decided the matter submitted to them, they refer to some parts of a book which are said to be missing—a mere question of evidence. I think it would be wrong for this Court to

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strain the meaning of words in order to upset what evidently was intended to be a concluded finding. This view is borne out by the fact, that although it is now suggested that the use of the word "will" shews the matter to be still undecided, no effort seems to have been made by the plaintiff to keep the arbitration open. As soon, however, as he found that the award was against him on the matter in dispute, namely, whether a thousand or three hundred shares were ordered, he gave notice that he would have nothing more to do with it. I think that this is a clear case and that the learned Judge was right in directing judgment to be entered for the defendants.

PARKER, J. I concur in the views expressed by His Honor.

MOORHEAD, J. I also agree with the judgment.

Appeal dismissed with costs.

Solicitors for appellant: *James & Darbyshire.*

Solicitors for respondents: *Jones, Smith & Norris.*

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April 23.

Hensman, J.
Parker, J.
Moorhead, J.

GAZE, PLAINTIFF (RESPONDENT).

THE JOHN HUNTER CO., DEFENDANTS (APPELLANTS).

Malicious prosecution—Want of reasonable and probable cause—Malice—Evidence for jury—Functions of Judge and jury—24 and 25 Vic., C. 96, Sec. 81—Public officer of company fraudulently appropriating property of company.

This was an appeal from the judgment of Parker, J., on the findings of a jury. The action was for malicious prosecution. The plaintiff, a servant of the defendant company, was charged before Justices under Sec. 81 of 24 and 25 Vic., C. 96 (adopted in Western Australia by 29 Vic., No. 5) that being a public officer of a public Company, he fraudulently took and applied to his own use and benefit certain property of such Company. After hearing evidence the Justices dismissed the information. The plaintiff then brought his action. The defendants pleaded that they had reasonable and probable cause for taking criminal proceedings against the plaintiff, and that in so doing they acted without malice. At the trial the questions of reasonable and probable cause, malice, and honest belief were left to the jury. Counsel for the defendants took the objection that, the facts being undisputed, the Judge should have decided the question of reasonable and probable cause. The jury found for the plaintiff on all the issues and assessed the damages at £100, the questions and answers being as follows:—(1) Did the defendants take reasonable care to inform themselves of the true facts of the case before they proceeded against the plaintiff?—No. (2) Did they honestly believe in the charge which they laid before the Magistrate?—No. (3) Were the defendants actuated by malice?—Yes. (4) Damages?—£100.

On Appeal.

Held (PARKER, J. diss.), that there was sufficient evidence to warrant the Judge in leaving the issue as to reasonable and probable cause to the jury, that he properly entered judgment for the plaintiff on the jury's findings on the issues left to them.

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Burt, K.C., for the appellants. The question of whether there was reasonable and probable cause was not a proper one to be left to the jury unless the whole of the facts that the defendants proceeded upon turned out to be untrustworthy and unreliable. Where the broad facts are virtually without dispute the Judge must decide the question of the presence or absence of reasonable and probable cause. *Abrath* v. *N. E. Railway Co.* (*a*). The Judge told the jury there was no evidence upon which they could find absence of reasonable and probable cause, and that being so he should have taken the case from them. *Slattery* v. *Dublin & Wicklow Co.* (*b*), *Brown* v. *Hawks* (*c*), *Lister* v. *Perryman* (*d*). There was no evidence whatever that the defendants did not honestly believe the charge, or that they were actuated by malice, and therefore those questions should have been decided by the Judge and not left to the jury. The main point in the case is indisputable, namely, that the plaintiff took the defendants' money and used it to pay his private debt.

James, K.C., for the respondent. In actions for malicious prosecution the duty is cast upon the plaintiff of proving a negative, and it is no defence to say that the evidence of malice is only slight. The appellant has to shew that there is not even slight evidence upon which the jury could reasonably find. If facts do not exist they may be inferred. *Taylor* v. *Willans* (*e*). The defendants shewed malice in asking their banker to sue the plaintiff as drawee of a bill instead of the endorser, and in endeavoring to obtain summary judgment in certain civil proceedings against the plaintiff, and in laying the information immediately after their failure to so obtain judgment. See *Springett* v. *London & S. W. Bank* (*f*).

Pilkington, following for the respondent. The accused should have been given an opportunity of explaining, and the absence of that opportunity indicates a failure on the part of the defendants to make proper enquiries. The suppression of a letter, which proved that in what the plaintiff did he acted openly, implies want of proper enquiry, and the jury were entitled to infer therefrom the absence of honest belief and the presence of malice.

Burt, K.C., in reply.

(*a*) 11 App. Cas. 247, 11 Q.B.D. 440.
(*b*) 3 App. Cas. 1155.
(*c*) (1891) 2 Q.B. 718.
(*d*) L.R., 4, H.L., 521.
(*e*) 2 Barnwell and Adolphus, 845.
(*f*) 1 Times L.R. 611.

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HENSMAN, J. This is an action for malicious prosecution, a somewhat peculiar form of action because it has been laid down now for many years that it is for the Judge to say whether there was an absence of reasonable cause for the prosecution, but for the jury to decide upon the other issues. The question of whether there was good ground for taking legal proceedings seems to me to be almost always a question of mixed law and fact, and I think that the rule that the Judge shall decide on this question is one that has given rise to a great deal of confusion, and to many subtle distinctions. I have always been of opinion that it would be far better that the questions at issue should be left to the jury, as they are in all other cases, subject of course to the direction of the Judge at points of law. It is the practice of Judges before they decide whether there was an absence of reasonable cause for the prosecution, to leave it to the jury to answer the question, "Did the prosecutor take reasonable care to ascertain the true facts of the case before he laid the charge." This was the question that was put to the jury in the present case, and the jury answered in favor of the plaintiff, that due enquiry was not previously made. That was a proper question to put, particularly in a case of this kind where the charge was of embezzlement, and where, before a reasonable man would lay the charge, it was necessary for him to make all due enquiries, to see whether he could substantiate it. The only question which the Court has to decide here is, was there any evidence fit for the jury in support of the plaintiff's claim, because, although a new trial has been moved for on the ground that the verdict was against the weight of evidence, that has been withdrawn. I propose very shortly to refer to the main facts of this case. It has been argued at considerable length, and we have had an immense mass of details put before us. I look at the matter broadly—and I think probably in the way the jury looked at it. The plaintiff was an old and trusted servant of the defendant company. He had formerly been managing director, and at the time of the prosecution he was their manager in this State. Even as late as April, that is the month after the cheque was given by him, the head of the defendant company, named Cabena, wrote to the effect that he had implicit confidence in the plaintiff, but that he was somewhat lax in his mode of dealing with affairs. It appears in evidence that he was in the habit of travelling for the company as a commercial traveller, and he had a right to get his reasonable expenses for his journey, and also he had

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a right to some extra expenses as manager. It is in evidence that, as a rule, no details are given of these expenses, and if a manager, or a traveller, had surplus moneys in his hands there was nothing wrong in his carrying them over for future use. On the present occasion—the 3rd of March, 1900—the plaintiff Gaze was applied to by his landlord for £27 rent which was due. He and a clerk named Conder had a right to draw cheques—one signed and the other countersigned—on the company's account. The plaintiff openly asked the clerk to draw a cheque to pay his landlord for rent, and that was done. On the butt or counterfoil of the cheque there were the words "private; rent" or some words of that kind. A short time after the landlord had gone away with the cheque, Gaze said to the clerk "I would rather it should be put down as travelling expenses." It appears that the company had objected to his drawing upon them in that way, as upon a banker, which he had formerly been in the habit of doing. On the 31st March, when the plaintiff returned from his journey, he wrote a letter to Mr. Cabena —as I have said was the head man, practically the company—informing him that he had had a hard trip and that his expenses amounted to about £52. If an inquiry had been made in the books, coupled with the facts to which I have referred, it could have been ascertained that there was a sum of £12 10s. received by the plaintiff which had not been entered in the books as an accountant would have entered it. It appears to me that this was particularly a case in which, before a prosecution took place, the plaintiff ought to have had an opportunity of explanation. In embezzlement, one of the leading matters to be considered in deciding on the question of guilt or innocence is this, whether the defendant has denied the receipt or not. It is put in a well-known work on Criminal Law "The usual presumptive evidence of guilt is that the defendant never accounted to his master for the money . . . or that he denied his having received it." If full enquiry had been made, and the plaintiff had had an opportunity of giving an explanation, it is probable that this prosecution would never have taken place. It is said that the opinion of counsel was taken and acted upon. The learned Judge left it to the jury to look at the case that was presented to counsel and then to look at his opinion having regard to that case. It may be that the facts are presented in such a way to counsel who is advising that the opinion is not of much value, or that certain things are assumed to be facts which are not so, but

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which the counsel advising is bound to assume to be facts. All these matters were left to the jury for them to decide whether proper enquiry was made into the facts, and upon the finding of the jury in the negative the Judge was practically bound to rule that there was an absence of reasonable and probable cause for the prosecution. That of itself *may* be evidence of malice. But it appears that some months after this cheque was taken, there were civil proceedings between the parties. I do not suggest that the company was not justified in taking those proceedings, but there was friction, and the proceedings, although legal, were pressed somewhat hardly against the plaintiff. Then there was the fact that the letter of the 31st of March which the plaintiff wrote to Cabena after his return from the trip, in which he said that he had spent £52 in the expenses, was not produced before the Magistrate although letters written before that date and letters written afterwards were produced. It was argued on one side that this was unintentional; on the other side that the letter was purposely suppressed. These matters were left to the jury, who were the judges, and they had to draw what inferences they thought fit. Upon the whole, I am of opinion that the learned Judge did right in leaving the case to the jury. He was clearly right to ask them the first question, "Did the defendants take reasonable care to ascertain the true facts." That being answered in the negative it was for the jury to find on the question of malice or of honest belief. It may be that the learned Judge would not himself have given the same verdict. But juries have to decide these matters of fact, and whether we like it or not, if there is evidence upon which they can find without being unreasonable, or perverse, the Courts are bound to respect their verdicts. This is not a question of whether the verdict was against the weight of evidence, but merely whether there was evidence for the jury or whether the Judge ought to have ordered judgment for the defendant. I think that there was evidence on which the jury had a right to find as they did, and that the verdict and judgment ought to stand. It is satisfactory to know that the damages in this case were very moderate. They cannot be objected to in any way. I am of opinion that this appeal should be dismissed.

PARKER, J. In this case I was the Judge who presided at the last trial and allowed the case to go to the jury. Although it is in

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some way gratifying to me to find that the action I adopted will be sustained by this Court, still, after very carefully reconsidering the matter, and also in view of the opinion I expressed upon the evidence at the trial, I cannot but think that I ought, at the trial, not to have allowed the case to go to the jury. I ought to have found that the plaintiff had failed to prove an absence of reasonable and probable cause. I do not desire to say anything further on the subject, because I have already spoken at considerable length, and my words are on record in the appeal.

MOORHEAD, J. In this matter I agree with the judgment of Mr. Justice Hensman. The action was one for malicious prosecution, and, as pointed out in the course of this argument, the onus lay upon the plaintiff of proving certain matters. He had to prove, first, the absence of reasonable and probable cause. He had to prove, secondly, that the defendants, when they laid the charge, did not honestly believe in it; and thirdly, he had to prove the presence of malice on the part of the defendants. Now, without going into the cases which have been quoted, at any length, it is apparent that all these matters which he had to prove were subjects just as much of inference as of direct proof; that, in other words, the jury were to look at the entire circumstances of the case, and to draw whatever inferences reasonable men might draw from the facts submitted to them in evidence. Now cases have been quoted before this Court to shew the position of the Judge, as distinguished from the jury, with regard to the first issue, that is the absence or the presence of reasonable and probable cause. For myself, I cannot agree with the sweeping dictum of Lord Justice Blackburn, which has been submitted to this Court. I think there are numerous instances where the absence or the presence of reasonable and probable cause must be the subject of inference on the part of the jury. Circumstances alter cases, and it is quite conceivable—quite easy to imagine numerous instances where, for instance, the defendants in actions of this description would not be bound to make enquiries of the person charged before actually laying the information, while on the other hand it would be opposed to all common sense that a master or employer should merely, upon the production of books, and on the strength of entries made in those books by other persons than the accused themselves, lay an information straight off, without asking for any further explana-

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tion. Now I know of no case which has been brought into this Court which, in my humble opinion, demanded or required an explanation on the part of the prosecution from the accused, prior to their laying the information, more than the particular charge, the subject matter of this enquiry. Here is a servant of the company —a servant high in their confidence—who had been in their employ for a number of years in an office of trust, so much so that only a few months prior to this information being laid he was the recipient of a letter saying that they had every confidence in his honesty. Now he receives his position as manager—a position which was auxiliary to that of managing director. He was a shareholder in the company, and as the result of enquiries instituted from a gentlemen, in whom they said subsequently, in their evidence, they had no confidence, and from a perusal of the books, which they stated they had little reliance upon, they consulted certain counsel with the object of laying an information for the practical embezzlement of £27. Now his Honor, Mr. Justice Hensman, has referred to the circumstances under which that cheque was drawn, and I do not, therefore, go over them, but what is apparent to me is this, that on a careful analysis of the books of that firm it would have been apparent that the sum of £12 10s. was unaccounted for. What would a reasonable man do under the circumstances? I am putting now the position of the jury upon the findings. What would those men, as business men, say? Would not they be perfectly justified in inferring that, under the particular circumstances that I have detailed, the reasonable course of action would have been to ask the man himself for an explanation as to the £12 10s.? But, apparently, no explanation was asked and the letter of March 31 was suppressed, as already referred to, or if not suppressed it was overlooked. Then we have to take the facts detailed as to the civil proceedings which were going on at the very time. With Mr. Justice Hensman I do not say that we must take it that they were actually enemies, but we know very well—at least the jury would be perfectly justified in concluding—that whether these civil proceedings would infallibly indicate malice or not, that no love, to make use of a common expression, was lost between the parties, and jurymen would be perfectly justified in drawing the conclusion that on the part of the defendants they were most anxious at that time to get rid of this particular individual, the plaintiff. That being so, there was sufficient evidence there to

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warrant the jury in coming to a conclusion that the defendants were anxious to get rid of this individual, and, therefore, they would be justified in arriving at the conclusion that the defendants were guilty of malice. Viewing all the surrounding circumstances I have come to the conclusion that there was sufficient evidence here to warrant the learned Judge in leaving the issues to the jury, and the jury having found on those particular issues, in the manner in which they have done, points to the fact that his Honor was correct in leaving the issues themselves to the jury. I do not propose to say anything further in the matter, but I concur in the judgment of his Honor, Mr. Justice Hensman, and agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Stone & Burt.*

Solicitors for respondent: *James & Darbyshire.*

DODD, SUPPLIANT (APPELLANT).
THE MINISTER FOR LANDS, DEFENDANT (RESPONDENT).

1902.

April 25.

Hensman, J.
Parker, J.
Moorhead, J.

Mineral Lease—Incorrect Survey Map—Innocent misrepresentation.

The appellant was the owner of a pastoral lease. On the 22nd June, 1898, he applied for a mineral lease. The application, so far as is material to the judgment, was:—"I apply for a lease of land which is more particularly described in the annexed schedule." The schedule contained a sketch in which a certain block, No. 342, was shewn, and the lease applied for was on the south boundary of that block. It appeared, however, that Block No. 342 was incorrectly delineated on a certain map, which, in a prior application for a protection area, had been handed to the appellant for his guidance. By that map the southern boundary of Block 342 was delineated as 10 chains further north than it should have been, and it was shewn thus in a corrected survey map subsequently issued. It was by reason of the error in this Survey Map that the applicant applied for his lease in the position that he did. His application was duly granted, and he took up the ground and carried out certain work and expended certain money upon it. Subsequently he was deprived of a portion of the land so taken up, and his workings upon it, in an action of trespass. Under these circumstances the present action was brought, claiming compensation from the respondent for having been wrongfully deprived of this land by reason of the error in the Survey Map. At the trial the Chief Justice entered judgment for the defendant at the close of the plaintiff's case.

Held, (1) that the representation contained in the incorrect Survey Map though untrue, and though it misled the appellant, being made honestly, and with a reasonable belief in its truth, no action for deceit lay. (2) That even if the pleadings were to be construed into a claim for breach of contract, that the map formed no part of the contract for a lease, it having been given in another transaction, and the application for lease containing no reference to the map, no action lay, either for breach of contract or breach of warranty.

On Appeal.

Harney, for appellant. The respondent misled the appellant

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by reason of the defective map supplied to him, and by reason of the misdescription therein he is entitled to compensation.

Burt, for respondent. Under Regulation 40 of the Mineral Lands Act it is for the applicant to point out exactly what he wanted and to forward a sketch plan of the land applied for. The appellant has not done this and was alone to blame.

HENSMAN, J. This is a petition of right in which one Dodd is the plaintiff, and the Minister of Lands is the defendant. I will refer very shortly to the pleadings in the case. The plaintiff alleged in his petition that on the 31st March, 1898, he applied for a protection area, under the Mineral Lands Act of 1892, in or near to a place called Arinoo, somewhere in the north of this State. On the 22nd of June, 1898, he applied for a mineral lease of other land adjacent to that to which I have just referred. He says that his description of the protection area was as it was given to him by the agents of the defendant, and that his description of the lease was of an area starting from a datum line not marked on the land but as delineated and shewn on the map which was issued, as he says, by the defendant for his guidance. It is not necessary to say anything more as to the allegations of the petition with regard to the protection area, because in the argument before this Court, the claim in respect of that piece of land was abandoned. The plaintiff alleges further that he pegged out according to the map, and that the line on the map was represented as being ten chains further north than the true datum line. As a result, he says that he found he had pegged out part of his leasehold land on land which has been described as Block 342, which did not belong to the defendant at that time, which the defendant had before then alienated, and from which he (the plaintiff) was afterwards ousted by the true owner. He further says that the wrong delineation on the map of the datum line was well known, or ought to have been known, to the defendant. He alleges that he entered into possession and expended money, time and labor for many months on the land, and claims damages for the value of the lease, and the return of the moneys which he has expended on it. For the defence, the defendant denies the material allegations of the petition, and alleges the plaintiffs own negligence in not ascertaining the proper position and boundaries of the alienated land from which he was ousted. At the trial before the Chief Justice, without a jury, at

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the close of the plaintiff's case, the learned Judge ordered judgment to be entered for the defendant, and this is an appeal from that judgment. It will be seen that, in form, this is an action for deceit or misrepresentation. The law on that matter has long been well and clearly established. An action will lie for a false and fraudulent representation made by the defendant to the plaintiff, which was intended by the defendant to be acted upon by the plaintiff, and which the plaintiff has acted upon, and by reason whereof he has suffered damage. Further, a false statement will be deemed to be fraudulent if it is made dishonestly, or by a person who does not know or care whether it is true or false, in other words who acts recklessly. But if the representation, although it is really untrue, is made honestly and with a reasonable belief in its truth, no action will lie. That has been the law laid down for many years, but I will just refer, for one moment, to a recent case in the House of Lords, of *Derry* v. *Peek* (*a*), which is reported in 14 Appeal Cases, 337, which, it seems to me, affirms the law previously established. The head note in that case is:—"In an action of deceit the plaintiff must prove absolute fraud. Fraud is proved when it is proved that the false representation has been made knowingly, or without caring whether it be true or false. Such a statement, if made with an honest belief that it is true, is not fraud and does not make the person making it liable to an action for deceit." Now, that being the law, what facts were proved by the plaintiff? In March he made an application to the Mines Department of the Government for a protection area to search for minerals. In April he had an interview with the Under Secretary of the Lands Department, who assisted him, or endeavoured to assist him, by saying that the best information that that Department had would be given to him to ascertain the situation of Block 342, the piece of private land to which I have already referred, and in the result, a map was furnished. There can be no doubt that this map has been since proved to be incorrect, because a survey afterwards made has shewn that the datum line, upon which the plaintiff relied, was ten chains out of its proper position. In June of the same year the plaintiff made application to the Department for a mineral lease. That application, without reading every word of it, is in this form:—"I, Dodd, do apply for a lease of land which is more particularly described in the annexed schedule." The schedule

(*a*) 14 App. Cas., 337.

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which I have not at this moment before me, defines the position in words, accompanied by a sketch in which Block 342 is shewn, and below that the lease or area applied for. In the application there are words by which he applies for a lease from a point so many chains from the south-east corner of Block 342. That application was approved of on the 30th July, and the plaintiff then went on to that portion of his supposed lease which was on Block 342, and commenced working there for minerals, and spent, as he says, a large amount of money on the land. The owners of Block 342 objected, and a fresh survey was made, which shews, as I have said, that the old survey was wrong, and, in fact, that the plaintiff's lease had infringed on this private land. He was, therefore, obliged to vacate it, and so lost the benefit of his workings. Now, do those facts support the plaintiff's claim in this action for false representation? There is no evidence whatever of any fraud, or of any wilful misrepresentation, or of any reckless mis-statement. On the contrary, the Lands Department, evidently in good faith, assisted the plaintiff to the best of their then ability A map was given to him which was properly made by surveyors, and might reasonably be supposed to be correct. One might well understand that in this large territory, in distant parts, mistakes like this will from time to time occur. That being so, it appears to me that, in dealing with the action in its present form, no case was made out. Further, it is clear that the statements on the map formed no part of the contract for the lease, so as to amount to a case of breach of contract or breach of warranty. The map was given to the applicant some time before he made the application. It was given in another transaction, and his application contained no reference whatever to the map. But it was argued by the learned counsel for the plaintiff that there were certain doctrines of equity which would assist him, to which I will in a moment refer. Now, I will assume that the form of this petition, for the sake of dealing with this matter, is not important. It may be that this, being a petition of right under the old Act, the Court is more confined to the case as set forth in the pleadings, than it might be in pleadings at Common Law. But I think the authorities that were referred to by the learned counsel shew that, even under the old form of petition, before the present Crown Suits Act, the Court looked upon the petition to the Sovereign to do right as one that should be dealt with on as broad and equitable grounds as possible. However, do

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the authorities support the view that this case ought to be dealt with, favorably to the plaintiff, by a Court sitting as a Court of Equity, as well as a Court of Law. One of the cases to which the learned counsel referred was the case of *Burrowes* v. *Lock* (*a*), which is reported in 10 Vesey Junior, 470. That was a case in which a trustee was charged in respect of a misrepresentation to a purchaser having notice, and alleging only that he did not recollect the fact. The case went before the then Master of the Rolls, and in the course of his judgment he said: "The Lord Chancellor, in *Evans* v. *Bicknell*, declared that the case of *Paisley* v. *Freeman*, and all others of that class, were more fit for a Court of Equity than a Court of Law, but his Lordship was clearly of opinion that it is a very old head of equity that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false . . . . In this case . . . . the excuse alleged by the trustee is that though he had received information of the fact he did not at the time recollect it. But what can the plaintiff do to make a case of this kind but shew, first, that the fact as represented is false"—and I assume that the plaintiff in this case has made out that the fact was false—"secondly, that the person making the representation had a knowledge of the fact contrary to it." As to that, I have already stated that there was not a trace of any evidence to shew that this information was false on the part of those who gave it to the plaintiff. Another case referred to was that of *Slim* v. *Croucher* (*b*). This was a case that came before the Lord Justices. Lord Campbell was the Chancellor at the time, and in the course of his judgment he said:—"In *Evans* v. *Bicknell* Lord Eldon certainly does say, 'If he knows it to be false,' but the meaning of that qualification of the proposition is, as I understand the words, if he makes a misrepresentation as to what he ought to have known, and what he did at one time know, although he alleges that, at the particular moment that he made the representation, he had forgotten it." These cases appear to me to shew that, neither at Common Law or in Equity, has the plaintiff in the present case a right to recover these damages which he claims. Now there is just one other point to which I will refer. At the close of the argument in this Court the learned counsel who was arguing for the appellant said that, at all

(*a*) 10 Vesey, 470. (*b*) 1 De G. F. & I., 518.

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events, the plaintiff was entitled to a return of the survey fees and the rent which he claims. I do not know exactly what the amounts would be, but something comparatively small. Now his action is for an entirely different matter. His action is to recover heavy damages. Even in his prayer at the end of the petition he does not speak of a return of the survey fees, but a return of moneys expended on the land. Now these, not having been claimed, it appears to me that it is impossible for the Court now to give any such damages. If the action had been merely for the moneys that he had paid, on the grounds that the consideration for which those moneys were paid had substantially failed, the case would be different. According to my present view I am of opinion that he would have been able to recover. In "Kerr on Fraud," the matter is very clearly put, that where there has been an innocent misrepresentation or misapprehension—which I take to have been the case here—it must be shewn that there has been a complete difference between what was represented and what was taken so as to claim compensation, as, for instance, where there is a misdescription of the quantity of land, or the acreage is very much less than what was represented. In this case I think the acreage is about half of what he would have got if the map was right, and the part he would have got if the map was right is the most valuable part of it, where he had spent his money. If the action had been for the return of those moneys I am inclined to think that he would have succeeded, but I think it is most unfair to the defendant that the Court should allow the plaintiff in this action to claim those fees. It may appear here that the plaintiff has suffered loss by reason of mistake. On his own evidence it is so. But we here—speaking for myself—can only decide this case according to the principles of law and equity, which we are bound to follow. At the trial there were circumstances which led the Judge, who was sitting both to try questions of fact as well as of law, to form the opinion that he expressed, that the plaintiff did in fact know that his lease was partly on private land, but that he thought at the time that the owner had practically abandoned it, and at all events he would take the risk, hoping that he would be able to keep the land. Now as to that I propose to express no opinion. I have merely expressed, as shortly as I can—although I fear at some length—my opinion upon the law which ought to be applied to the facts of this case, as proved or admitted by the plaintiff. Although I am of opinion that

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we can make no order to that effect, I throw it out that perhaps the Government might do well to consider the setting off of these survey fees and rent against any costs that they may be able to recover. For these reasons I am of opinion that this appeal ought to be dismissed.

PARKER, J. The plaintiff's claim in this action is founded upon a false representation. Now it is perfectly clear in the cases quoted by Mr. Justice Hensman, and especially of *Derry* v. *Peek* to which he referred, that in order to obtain damages for false representation—which in effect is an action of deceit—it must be shewn that the representation was made fraudulently, that is, dishonestly. The evidence produced by the petitioner failed entirely in shewing that the representation here was fraudulent, consequently it seems to me that this action must fail, and on this point I concur entirely with the views expressed by the learned Judge. With respect, however, to the remarks which Mr. Justice Hensmen has made, as to whether the plaintiff might recover in an action the fees which he has paid to the Government by way of rent and survey fees, I have doubts upon the subject. It must be borne in mind that the petitioner made an application in writing, and in that application he applied for a parcel of land situated at the southern boundary of a location already granted by the Government—in fact alienated many years ago—known as 342. He in no way referred to a representation, which he said had been made to him previously, or a map which had been furnished to him by the Lands Department, and we find that he obtained a grant of exactly what he applied for. Such being the case, I doubt myself whether he could possibly recover even the monies which he has paid by way of rent, or the survey fees. Otherwise I concur entirely in the views expressed by the learned Judge.

MOORHEAD, J. I also agree, in the main, with the view expressed by Mr. Justice Hensman, but I wish to guard myself from agreeing to the judgment being permitted in any way to declare that in a subsequent action the plaintiff could recover back the fees which he has paid to the Government. At the present moment, and on the evidence which has been produced, I cannot see that the plaintiff could so recover. His action would be necessarily based on mistake. The evidence which would be

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adduced to prove that mistake would be the supplying of this particular map, which has been alluded to in the case itself. Now, how did that map come to be supplied by the Lands Department? I find on the evidence that it was supplied to him when he made application for a protection area. Some months after that he makes an application for a mineral lease. Now, how it could be construed that that map was supplied to him for the purpose of giving him information on the application for a mineral lease is beyond my comprehension. I can understand his being misled as to the protection area, but, so far as I can see from his evidence, there was no expenditure of funds in connection with that particular portion. I cannot see, therefore, on the evidence which has been given—it might be supplemented in another action—that he was misled in any respect when applying for his mineral lease. I can see no mistake, as far as the Department was concerned. I wish, therefore, to guard myself from agreeing to the statement that the plaintiff must necessarily succeed on any subsequent action for the recovery of the monies expended by him. I concur with the other learned Judges in their decision against this appeal.

HENSMAN, J. I desire to add that I by no means intended to give any judicial effect to the statement that the plaintiff would, in an action to recover the survey fees and rent paid by him, succeed. I was rather throwing out the suggestion that possibly the Government might put an end to all proceedings by setting those fees off against any costs they may be entitled to. I do not, however, wish to give a judicial opinion on that matter.

Appeal dismissed.

Solicitors for appellant: *Harney & Harney.*

Solicitor for respondent: *Crown Solicitor.*

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CARGEEG, PLAINTIFF (RESPONDENT).

HUELIN, DEFENDANT (APPELLANT).

1902.

April 29.

Hensman, J.
Parker, J.
Moorhead, J.

Local Court—Sale of land—Agent—Want of authority—Admissibility of evidence —Substantial injustice to appellant.

This was an appeal from a judgment of the Local Court, Perth.

The plaintiff sued the defendant for the return of a sum of money had and received by him for the use of the plaintiff, being instalments of purchase money paid by the plaintiff to the defendant as agent for the owner of certain land on a contract of sale of such land. It was contended on the part of the plaintiff that the defendant had no authority from the owner of the land to enter into the contract. Judgment was entered for the plaintiff. At the hearing the Magistrate admitted in evidence a letter written by Mrs. Quigley, the owner of the land, to her solicitor, and by him shewn to the defendant. Defendant's counsel contended that this letter was inadmissible in evidence, and raised the further point that the defendant was not called upon to shew that he could give a title to the land until the whole amount of the purchase money had been tendered On these grounds the defendant appealed and asked for a direction of non-suit, or in the alternative, for a new trial.

On Appeal.

Held, that the letter was not evidence to prove want of authority from Mrs. Quigley to the defendant, but that inasmuch as there was other evidence before the Magistrate upon which he could properly find a verdict for the plaintiff, and therefore there was no injustice caused by the admission in evidence of the letter, the appeal must be dismissed.

Alcock, for the appellant. The Magistrate improperly admitted a letter written to the plaintiff's solicitor by Mrs. Quigley, she not being a party to the action. It has not been proved that the defendant was unable to give a title, the only evidence on the point being the letter of Mrs. Quigley, which is inadmissible. There was no breach of contract. The defendant's evidence shews that he could give a title as he had a transfer. The plaintiff should have tendered the amount of the purchase money either to the defendant or to Mrs. Quigley to ascertain whether a title could be given by the defendant. See *Cottle* v. *Champion* (*a*).

Robinson, for the respondent. The letter objected to is admissible because written in reply to one sent to Mrs. Quigley at defendant's request by plaintiff's solicitor and because it was read over to defendant. The defendant's own letters to Mrs. Quigley admit that she repudiated his authority. The defendant had no authority to sell upon the terms he did, although authorised to sell at a certain price.

(*a*) 2 Peake, 45.

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Alcock, in reply.

HENSMAN, J. In this case the action is by Mrs. Cargeeg against Huelin, the defendant, to recover £13 which she has paid to him in respect of a contract for the sale to her of certain property. It is alleged that defendant entered into the contract with the plaintiff, as agent for Mrs. Quigley, the owner of the land, without having any authority to do so. The appeal is on two grounds—first, that there was no breach of contract, and secondly, that certain letters were improperly received in evidence. The letter of the 26th April, 1901, is the letter that is chiefly relied upon, and that is a letter written by Mrs. Quigley to her solicitor. It is true that that letter was shewn to the defendant, but I am of opinion that it was not evidence in this case to prove want of authority. Mrs. Quigley should have been called as a witness. The question therefore is whether there was other evidence justifying the Magistrate in finding as he did. On the 10th of December the defendant wrote to the husband of the plaintiff saying that he was duly authorised to sell the block of land on the terms suggested, and he says, "If you see your way to close with this offer, please let me know at once." On the 12th December he wrote to Mrs. Quigley, the owner of the land, "I have an offer for Lot 91 which is very close to your figures and instructions. You wanted £20 on terms, the purchaser paying interest on bills." The letter continues "Unless I hear from you I shall accept the terms, sign the contract, and send you cheque for the first instalment." On the 17th December the defendant, acting as agent for the vendor, entered into the contract with the plaintiff. He sent a cheque for £5 to Mrs. Quigley, who, a few days afterwards, wrote back, "Your letter duly to hand enclosing me cheque for £5, which astonishes me." She in effect repudiated the contract. Then there is the evidence of Mr. Cox, who said, "I produced the contract to the defendant and asked him for a refund, and told him Mrs. Quigley refused to carry out the contract. He did not agree at first, but afterwards he said 'Yes.'" The action is for entering into a contract as agent without the authority of the alleged principal. The Magistrate found—and I think he was justified in so finding on the evidence—that Mrs. Quigley did not authorise the defendant to enter into the contract in question. The rule on these appeals is that no motion shall succeed on the ground of the improper reception of evidence unless substantial injustice has been thereby caused.

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Although the letter, which was wrongly admitted, may have operated upon the mind of the Magistrate, yet in my opinion, there was other evidence before him upon which he could properly find as he did, and therefore there was no injustice caused by the admission of that letter. I am of opinion that the appeal should be dismissed.

PARKER, J. I concur.

MOORHEAD, J. I also concur in the judgment. I see no necessity to add anything further to the judgment of Mr. Justice Hensman.

Appeal dismissed.

Solicitor for the appellant: *F. M. Alcock.*

Solicitors for the respondent: *Haynes, Robinson & Cox.*

TOGIN, PLAINTIFF (RESPONDENT).

BUDESA, DEFENDANT (APPELLANT).

1902.

April 30.

Hensman, J.
Parker, J.
Moorhead, J.

Local Court—Statute of frauds, Sec. 4—Receipt—Payment into Court.

This was an appeal from a decision of the Magistrate of the Local Court at Fremantle.

The plaintiff's claim was for damages for breach of a contract between himself and the defendant whereby the defendant sold and the plaintiff purchased for £125 a wine saloon and certain stock-in-trade belonging thereto. There was a further claim for £20 for money had and received by the defendant for the use of the plaintiff, the same being a part payment of the purchase money. A receipt was given for the £20, which, however, did not state the purchase price. The defendant denied the contract and paid £20 into Court, he also pleaded alternatively Section 4 of the Statute of Frauds. The Magistrate found for the plaintiff and gave judgment for the £20 paid into Court, and also for £15 damages for breach of contract.

On Appeal.

Held, that the receipt did not satisfy the Statute of Frauds, and that therefore the contract not being enforceable the plaintiff was not entitled to damages for its breach.

J. D. Moss, for the appellant. A receipt is not sufficient to satisfy Section 4 of the Statute of Frauds. The subject matter of a contract, and particularly the price, must be in writing. *Blagden* v. *Bradbear* (*a*).

A. D. Stone, for the respondent. Payment into Court cannot be made with a denial of liability. The payment in is absolute, and being absolute it necessarily carries with it an admission of the cause of action. *Hennell* v. *Davies* (*b*). The contract is admitted by the pay-

(*a*) 8 R.R., 354, 12 Vesey, 466. (*b*) (1893) 3 Q.B., 367.

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ment into Court, and there being evidence to support a claim for damages for breach thereof as found by the Magistrate, this Court ought not to interfere with the *quantum* thereof. *Archer* v. *English* (a).

Moss in reply.

HENSMAN, J. This case, although the amount at stake is small, has given rise to some nice questions of law, and the Court has not been assisted by pleadings, because in the Court below there are practically no pleadings, and things are very properly done in a much more summary way than in the Supreme Court. It is argued that the payment into Court of £20 admits the whole cause of action. The plaintiff's claim is for breach of a contract for sale of land. He claims damages for that breach, and he further claims £20 for money had and received by the defendant for the use of the plaintiff. It appears that the £20 was paid to the defendant on an oral agreement, as part payment of a sum of £115 or £120, and a receipt was afterwards given which clearly does not satisfy the Statute of Frauds. For one thing it does not set forth the amount of the contract price. By the payment into Court it is argued that the defendant admitted the cause of action in respect of a good and valid contract. I cannot take that view, for this reason: the claim is divisible—it first alleges damages for breach of contract, and then it alleges a demand for money paid under that contract. It may be that logically it is assumed by the defendant that there was a valid contract, but it is to be observed that the money was paid into Court without prejudice to the defence of the action, and although the rules of the County Court do not provide for such a plea, or for such a payment into Court, yet at the same time I think it is clear that the defendant never intended to admit a good contract with reference to the Statute of Frauds. The position he took up was this: "It is a contract which I shall not carry out for my own reasons," and one of those reasons is, "I choose to rely upon the Statute of Frauds. But inasmuch as I have got £20 which was paid as a deposit I cannot keep that money. The agreement was not that it should be forfeited on non-completion of the contract. I am therefore bound to return it; and I pay it into Court." That being so, when the case came before the Magistrate the Statute of Frauds was relied upon, but the Magistrate gave judgment not only for the £20 paid into Court, but also for £15 for breach of contract. I

(a) 1 Manning & Grainger, 873.

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desire always, if possible, to support Magistrates in dealing with such cases, if it can be lawfully done, because they have a great number of small cases coming before them, and they have to decide many difficult points of law, which arise sometimes in the smallest cases, and often without the assistance of legal arguments. I am not at all surprised that the Magistrate came to the decision he did on this somewhat nice question; but I think that his decision should have only been for the £20, and that the defence set up at the trial of the Statute of Frauds should have prevailed. The plaintiff was not entitled to damages for breach of the contract, because it was not one which was enforceable at law. In my opinion we should vary the Magistrate's order by reducing the amount to £20.

PARKER, J.: I concur.

MOORHEAD, J.: I also concur.

Appeal allowed.

Solicitors for appellant: *Moss & Barsden.*

Solicitor for respondent: *R. W. Beresford.*

STONE AND HASELDEN, APPLICANTS (APPELLANTS).
THE REGISTRAR OF TITLES (RESPONDENT).

1902.
April 30.

Hensman, J.
Parker, J.
Moorhead, J.

59 *Vic. No.* 10, *Section* 168 (*Municipal Institutions Act*, 1895)—64 *Vic., No.* 8, *Sections* 358, 359, 350 (*Municipal Institutions Act*, 1900—)*Non-payment of rates —Sale of land—Transfer free from encumbrances—Certificate of sale—Transfer of Land Act*, 1893, *Sections* 74, 82—*Registration—Enquiry by mortgagee.*

Summons, adjourned from the Judge in Chambers, calling upon the Registrar of Titles to uphold the grounds of his refusal to register the applicants as proprietors of certain land free from all encumbrances. The land stood in the Office of Titles in the name of William Cameron, and was charged together with other lands to the extent of £900. An order has been obtained from Pennefather, J., pursuant to Section 358 of 64 Vic., No. 8 (The Municipal Institutions Act, 1900) for the sale of the land for non-payment of rates. The petition upon which the order was obtained, as well as the order itself, stated the names of the owners as "William Cameron's executors." The land was duly sold at auction and purchased by the appellants. Upon production of the certificate of sale by the purchasers for registration as a transfer (as provided by Section 359 of the Municipal Institutions Act, 1900) the Registrar of Titles refused to register the same.

Held, that the Registrar of Titles was right in refusing to register the applicants as proprietors of the land in question, free from encumbrances.

Dr. Smith (Commissioner of Titles) shewed cause. The Judge's order does not direct the sale of William Cameron's land, but of the land of William Cameron's executors. The records of the

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Titles Office shew no land as belonging to William Cameron's executors. The words of Section 359 of the Municipal Institutions Act, 1900, requiring the Registrar of Titles to register the certificate of sale as a transfer, mean that such certificate is to be registered, as are all other transfers, subject to the encumbrances. (Section 82, Transfer of Land Act, 1893).

Abbott, for the appellants. Section 350 of 64 Vic., No. 8, and Section 168 of 59 Vic., No. 10 (The Municipal Institutions Act, 1895) are to be read together, and they make rates an absolute charge in priority to every security or claim excepting Crown debts. So long as the land is properly described the name of the owner is not material, the notice provided by the 17th Schedule of the Municipal Institutions Act, 1900, not being directed to any particular individual, but to all persons interested. A mortgagee is put upon enquiry to see that rates are paid, in the same way that it is incumbent upon him to see that insurances are maintained. The order to sell the property refers to the legal estate and not to the equity of redemption. The sale is not invalidated by any informality, and the purchasers are not affected thereby, but the Council themselves will have to indemnify any parties suffering damage by reason thereof. Sections 350, 358 and 359 all point to the fact that it is the fee simple, and not the "right, title and interest" that is sold.

Dr. Smith, in reply. Section 168 of 59 Vic., No. 10, does not create a charge for rates, but only gives power for distress and sale. The 74th Section of the Transfer of Land Act requires the transfer to be noted on the duplicate Certificate of Title. The applicants have not produced the duplicate, and the Registrar of Titles cannot therefore register.

HENSMAN, J. In this case the Registrar of Titles has been asked to register a transfer of land, free from encumbrances, which he has objected to do. This is a summons referred by me in Chambers to this Court, calling upon the Registrar to substantiate and uphold the grounds of his refusal to register Patrick Stone and James Haselden as the proprietors of the land in question, free from encumbrances. The case came before me in Vacation at Chambers, and I had, at the time, doubts whether it was not a case for the Court. Upon further consideration I am of opinion that it is a case

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for this Court, because the section dealing with it uses the word "Court." It says, "The party aggrieved may go to the Court upon a summons issued by order of a Judge," thus distinguishing in the same section between "Court" and "Judge." It appears that the lands were sold by auction because rates had been due upon them for more than eighteen months, and the purchasers got a certificate from the auctioneer, according to the Act, and presented it to the Registrar of Titles. It turned out that the land was subject to several mortgages. It has been argued that Section 350 of the Municipalities Act shews that the rates, when recovered in this manner, are a charge upon the land and take precedence over these mortgages. I am of opinion that Section 350 has no bearing upon the case. That section says that "If an amount payable in respect of a rate remains unpaid for thirty days the Council may recover it by action at law or by distress and sale of goods as thereinafter mentioned." Then it goes on to say, that, "The amount of costs, charges and expenses shall constitute a charge and have priority, after Crown debts, over every security or claim, including rent, of every description." It is to be observed that that is a procedure which is to be either by action at law or by distress and sale of goods and chattels, neither of which courses was pursued here. It seems to me that the case must be decided by Sections 358 and 359, which relate to a different state of things. If the amount due for rates remains unpaid for eighteen months a notice is to be put in the Government Gazette and in certain newspapers, stating the amount due and unpaid in respect of such land, describing the said land by the name, if any, by which the same is usually known, and by the name of the owner or last known owner of the same, and warning the owner of the same and all other persons interested therein, that in default of payment the land will be sold. Then an order has to be got from a Judge of the Supreme Court, who, on being satisfied of the truth of the aforesaid circumstances, may order the land to be sold to satisify the amount of the rate. The next section says, "The auctioneer's certificate is to be presented to the Registrar, and the Registrar shall, if such land be already under the said Act, register the said certificate of sale by the auctioneer as a transfer of the land therein mentioned, and make all such entries, and do all such acts, matters and things in respect thereof, as the Registrar is required to do in a like transfer under the said Act." This

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certificate was brought to the Registrar, who saw that there were mortgages upon the title. He knew that in a transfer under the Act he could only register the transfer subject to the encumbrances, and he therefore declined, and, in my opinion, rightly declined, to register the same free from encumbrances. That disposes of the objection that was taken by the Registrar. But in the argument before us it was suggested that the advertisement in the Gazette and newspapers was not correct, inasmuch as it did not describe the names of the owner, or owners. It is not necessary to decide this point, because the decision of the Court will be upon the ground that I have just mentioned. It does, however, appear to me that where the Act says that land may be sold, and that the advertisement is to contain the name of the owner or last known owner of the land, and warning the owner and all persons interested therein that the name ought to be clearly specified. Also, if by search it can be found that there are mortgagees, I am inclined to think that their names should be mentioned as well. The mortgagees and all other persons interested ought to have such notice as can be reasonably given. In the present case the name of the owner was not mentioned, the owner was merely described as "The executors of Cameron." That is not, to my mind, naming them in accordance with this Act. Supposing it had been "The trustees of Cameron" one could not say that those persons had been "named"; it would only be mentioning the office that certain unnamed persons held in connection with the land. It appears to me, in the present case, that it is very doubtful whether the advertisement authorised the sale. It is not necessary to decide this point now. The Judge in Chambers was satisfied on an *ex parte* application, and he did order the land to be sold. It has been said that that is binding on this Court. I cannot assent to that argument for this reason: it was an *ex parte* application to the Judge in Chambers, and there was no opportunity given to the persons interested to object to or appeal against the order. That being so, if such a case should come before this Court for decision, I think it would be open to the Court to consider whether the order was properly made or not. I am of opinion that this summons should be dismissed.

PARKER, J. I concur in the view taken by His Honor Mr. Justice Hensman; and I may say, further, that it seems to me that even if the applicants in this case could bring in Section 350 to

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their aid, or Section 168 of the old Municipalities Act, that it is more than doubtful whether the priority thereby created is a priority over existing registered mortgages. The 168th Section of the old Municipalities Act, and also the 350th Section of the present Act, declare that the amount of the rate in one case, and the costs and expenses in the other, shall be a charge, after Crown debts, over every security, against the real and personal estate of the person owing the rates. Well, now to ascertain what priority a Crown debt has over a mortgage. It is obvious, from reading the wording of the section, that the rate comes after a Crown debt. Now in former times, no doubt, the Crown at Common Law had a lien on, and could issue a writ of execution against the lands and goods of debtors, and this right remained to the Crown—except in one or two cases—notwithstanding that the priority had passed into the hands of other persons. The effect of that was such that persons buying lands had great difficulty in ascertaining whether the lands purchased by them might not, subsequently to the completion of the purchase, be taken by the Crown for a debt owing by the vendor. To remedy that state of affairs an Act was passed in Great Britain in the early years of the reign of Her late lamented Majesty—the second and third Victoria, chapter II. That Act enacted that for the future no judgment obtained by the Crown should be effective against purchasers or mortgagees of the lands of the debtors, unless a memorandum of such judgment was registered in the Common Pleas. Now that Act was adopted in Western Australia many years ago, and the effect of that Act, it appears to me, is this, that a Crown debt, unless registered in some manner—in this case it seems to me it should be registered in the Lands Titles office, where the land is under the operation of the Act—it takes no priority. Then we turn to the Crown Suits Act, 67 Victoria, No. 9, and we find that view confirmed, because it is in effect enacted there that judgments for Crown debts, even when registered, do not take priority over mortgages registered. There is a provision in the Crown Suits Act to the effect that *lis pendens* can be registered; that is, if the Crown are about to bring an action against any person, the Crown can register in the Titles Office a memorandum of the amount of its claim; and it is especially enacted that the registration of that memorandum shall not affect or take priority over registered instruments. If the Crown recovers a judgment, the registration of that memorandum becomes

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effective, and it takes effect after all mortgages then registered. And not only does the Crown Suits Act enact that, but it states further that such a registered memorandum of a judgment obtained by the Crown shall not affect any caveat with respect to any unregistered instrument. It, therefore, seems to me that a Crown debt has no priority over a registered mortgage, and, as the rate is declared to come after a Crown debt, it obviously cannot create a charge in priority to a registered mortgage. Therefore, assuming that the applicants can bring in aid this 350th Section and say that they have a charge, it seems to me that a charge has no effect against a registered mortgage. As I have stated, I concur in the view expressed by the learned Judge, and for these additional reasons I think that this summons should be dismissed.

MOORHEAD, J. I also am of opinion that this summons should be dismissed. I have no doubt whatever that the Legislature intended that the rates should take a priority, which a casual reading of Section 350 would lead one to believe, but, on looking closer into the section, I think we must be forced to the conclusion just pointed out by Mr. Justice Parker, that is, that instead of this rate charge taking the priority that the Legislature intended, it really comes subsequent to Crown debts. And if we turn to the Imperial Statutes, which have been adopted in this State, we find that Crown debts themselves rank merely as ordinary mortgages, that the security really dates from the date of the registration, and that, therefore, this particular charge created by Section 350 comes in the ordinary list, its effectiveness dating from the date of registration, and taking priority only from its position on the list itself. Now it is a peculiar thing in dealing with that Section 350, that an important portion has been omitted by the Legislature, and that is that the rates themselves do not become a charge, it is merely the costs, charges and expenses of an action at law, and of a distress, which becomes a charge. Now, it is well recognised that where any important alteration of the Law is to be effected, especially dealing with the interest of private individuals, that the language ought to be clear and unmistakable, and if it were intended here that such a charge as that—that is a charge brought about by recovery at law and by distress, of these particular rates—should practically wipe out the other mortgages, then we should be on our guard to see that the language of the section is clear and

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unmistakable. Now after carefully considering that Section 350, and the other sections alluded to by counsel who so ably conducted this application, I can find nothing that points to the fact that a charge for these particular rates is practically an annulment of all other interests that may be affecting that particular title. I think that when the Registrar is directed to register this particular transfer by order of a Judge, he is to register it in the ordinary course, that is, subject to the encumbrances already notified in the office. For these reasons, and the reasons already alluded to by Mr. Justice Hensman and Mr. Justice Parker, I concur in the decision of the Court that the summons should be dismissed.

Appeal dismissed.

Solicitor for appellants: *A. F. Abbott.*

Respondent in person.

SHERRY AND TAIT (PLAINTIFFS).

COMMISSIONER OF RAILWAYS, DEFENDANT (RESPONDENT).

NOYES, THIRD PARTY (APPELLANT).

1902.

April 30.

Hensman, J.
Parker, J.
Moorhead, J.

Security for costs of appeal—Affidavit not accompanying notice.

This was a motion on the part of the defendant (respondent) for security for costs of the appeal.

Alcock, for the appellant, objected that the affidavit in support not accompanying the notice of motion, the latter was bad.

HENSMAN, J. I am of opinion that the fact that affidavits have not been served with the notice of motion is not fatal. If it were fatal I should expect to see a rule to that effect. My impression is that it has always been the practice to serve affidavits with the notice of motion, and I think it is a very good practice, as it is clear that the appellant is entitled to know what he has to answer. But it may be that by a slip the affidavit is not served with the notice of motion, and if that is to render the notice invalid I should require to see a rule to that effect.

PARKER, J. I agree.

MOORHEAD, J. I concur.

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April 29.

The C. J.
Hensman, J.
Parker, J.

SHERRY AND TAIT (PLAINTIFFS).
COMMISSIONER OF RAILWAYS, DEFENDANT (RESPONDENT).
NOYES, THIRD PARTY (APPELLANT).

Carriage of goods—Negligent Delivery—Third party—Implied contract of indemnity—Issue of fact—Inference of law—New trial.

This was a motion to reverse the judgment of Parker, J. The plaintiff Sherry sent three cases of goods to the Railway Station at Busselton, consigned to A. L. Tait, and paid the freight on same. Noyes, the third party, thereupon wired to the defendant, the Commissioner of Railways, requesting him to delay delivery, which the Commissioner declined to do without a Judge's order. Noyes subsequently claimed the goods at the Railway Station, and they were handed over to him. The plaintiff then sued the defendant for the value of the goods. A third party notice was taken out to which Noyes duly entered appearance, and he was a party at the trial. The action (which was tried by a Judge and jury) resulted in the plaintiff's favor. The defendant then applied to the Judge for an indemnity against the third party for the amount of judgment and costs, and the Judge made an order accordingly. Against this order the third party now appealed.

On Appeal.

Held, that the Judge was right in holding that there was an implied contract of indemnity between the third party and the defendant, and that even if the Judge had left the question to the jury as an issue of fact, instead of treating it (as he did) as an inference of law, the jury would have been justified in finding as a fact on the evidence that there was an implied indemnity, and that as the Court is not bound to order a new trial unless there has been a substantial miscarriage of justice the appeal should be dismissed.

Alcock, for the appellant. There is no evidence of an indemnity having been agreed upon by the parties, and none from which an indemnity can be implied. The third party simply gave the Commissioner of Railways notice that these goods had been removed from his hotel in defiance of an injunction, and therefore, if liable at all, was only liable on a misrepresentation. The question of indemnity should have been submitted to the jury. There should be some evidence that Noyes, either from the way he claimed the goods or from some express words, led the defendant to believe that he would indemnify him from any loss sustained. It was admitted by the defendant at the trial that his proper course was to have interpleaded. See *Betts* v. *Drewe and Gibbins* (*a*), *Birmingham and District Land Company* v. *London and North Western Railway* (*b*). The verdict was against the weight of evidence.

Draper, for the respondent. This not being a motion for a new trial it is not open to the third party to raise the question that

(*a*) 41 Rev. Rep., 381. (*b*) 34 Ch. D., 261.

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the judgment is against the weight of evidence, *Christie* v. *Harvey and Hayward* (*a*). The appeal being against the finding of a Judge, it must be conclusively proved that he was wrong upon the evidence before him, *Colonial Securities Trust Company* v. *Massey* (*b*). Noyes admitted that he had claimed the goods, and by that admission there is an implied indemnity. Where A does a thing at the request of B, and A subsequently suffers damage, B has undertaken impliedly to indemnify A. I rely on *Betts* v. *Drewe and Gibbins*, and *Birmingham Land Company* v. *London and North Western Railway*, cited contra.

Alcock, in reply.

HENSMAN, J. This is an appeal from the decision of Mr. Justice Parker, who sat with a jury to try the case, and who, after the verdict of the jury, gave a decision on a point of law which arose. It appears that the plaintiff brought an action against the Commissioner of Railways upon the ground that she had delivered to him—he being a carrier of goods for hire—certain goods, her property, and that he had unlawfully and negligently delivered them to a third person, whereby she lost the goods. The Commissioner pleaded to the claim, and afterwards, before the case came to trial, an order was made that the person to whom or to whose agent the goods were delivered should be brought in under the third party procedure, which was done. The case came on for trial before a jury, who found that the goods in question belonged to the plaintiff and not to the third party, who at that time had and still has possession of them, and they assessed the damages. After the verdict was given and motion made for judgment, the learned Judge heard an argument upon the question of whether the defendant Commissioner ought to be repaid by reason of an indemnity given to him by the third party, and the Judge decided in the affirmative and gave judgment for the Commissioner against the third party. This has been appealed from. It appears that the plaintiff was a tenant of a hotel at Busselton, and the third party, Noyes, was the landlord. The plaintiff removed certain goods from the hotel to send them by railway to Bunbury, and while the goods were lying at the Busselton Station Noyes obtained an *ex parte* interim injunction to restrain the plaintiff from removing the goods from the hotel. That injunction was too late, because at that time the goods were in the hands of the Commissioner of Railways, and the injunction

(*a*) 3 W.A.L.R., 21. (*b*) (1896) 1 Q.B., 38.

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had no effect upon him. At the request of Noyes the Commissioner delivered the goods to him instead of forwarding them to their destination, as consigned by the plaintiff, and he therefore became liable to an action by the plaintiff, who has been found to be the owner of the goods by the verdict of the jury. I think that the Commissioner's proper course was to have interpleaded, but he thought fit to act upon the request of Noyes, and I am of opinion that the learned Judge was right in holding that there was implied contract of indemnity by Noyes. The law generally may be stated as it is summarised in Addison: "When an act has been done by A under the express directions of B, which occasions an injury to third persons, B is bound to indemnify A against the consequences. . . Where the plaintiff at the request of the defendant had delivered to him certain goods which belonged to a third party, it was held that a promise to indemnify might be implied." It has been urged before us that this question ought to have been put to the jury, but it appears that no request was made that this issue should be put to the jury. It may be a question whether it was not an issue of fact, but I am inclined to think, upon the admitted facts here, that it was an inference of law. But even if the Judge was wrong in not putting the issue before the jury, yet by the Rules we are not bound to order a new trial, unless it be shewn that there was a substantial miscarriage of justice. I am of opinion that if it had been put to the jury they would have been justified in finding that there was implied imdemnity. It must be borne in mind that we are not to interfere with the decision of the Judge, or upset his opinions, unless we are satisfied that he is clearly wrong. Then it has been said that the judgment is against the weight of evidence. I have not had an opportunity of reading through the whole of the evidence, but there was evidence submitted on both sides, and the jury found for the plaintiff. There is nothing unreasonable in that finding, and the counsel for the appellant has not pointed out to the Court any point upon which the verdict was against the weight of evidence. Therefore I am of opinion that the appeal should be dismissed.

PARKER, J. I concur.

MOORHEAD, J. I also concur with the judgment.

Appeal dismissed.

Solicitor for appellant: *F. M. Alcock.*

Solicitor for respondent: *Crown Solicitor.*

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MARSHALL BROTHERS, PLAINTIFFS (RESPONDENTS).

WESTON, DEFENDANT (APPELLANT).

1902.

April 30.

Hensman, J.
Parker, J.
Moorhead, J.

Local Court—Partnership—Counter-claim—Accounts

This was an appeal from a decision of the Magistrate of the Local Court at Fremantle. A partnership previously existing between the appellant and the respondents having been dissolved, an agreement was made that they should carry on a portion of the partnership business, namely, to the extent of cutting and selling the wood on a certain lease, the partners sharing the expenses and dividing the profits therein. In respect of this limited partnership the appellant lent the respondents a sum of £50, for which amount he counter-claimed in an action brought against him by the respondents in the Local Court. The Magistrate found for the respondents on the counter-claim on the ground that, although the money was proved to be due, it was a matter that could only be decided by the Supreme Court, in an action for partnership accounts then pending between the parties. From this decision the appellant appealed on the grounds (*inter alia*) that it had been found that the money had been lent and had not been repaid, and that the subject of the loan was distinct from all matters relating to the partnership, and ought to have been determined without reference to the partnership.

On Appeal.

Held, that on the evidence the Magistrate was justified in deciding as a matter of fact that the money was advanced to the respondents for the purposes of the limited partnership, and that accordingly the appellant could not recover the money on his counter-claim, but could have credit for it in the action in the Supreme Court, then pending between the parties.

Barsden, for the appellant. There being no dispute as to the amount owing, the verdict should have been for the defendant. The loan had no relation to the partnership business which had been dissolved.

James, for the respondents. The partnership was only partially dissolved, and it was agreed that certain wood carting should be continued. It was in respect of this wood carting that the money counter-claimed for had been advanced. The amount having been lent for partnership purposes is not recoverable until the final balance is struck and arrived at in the action now pending between the parties.

HENSMAN, J. In this case the question is whether the defendant had the right to bring this counter-claim in the Local Court. If it was in respect of a matter connected with an outstanding partnership account he could not bring it. He could only do so if his claim was for a balance after a settlement of the account, or if it was for a loan unconnected with the partnership. It appears

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that the original partnership had been dissolved, but the parties agreed to carry on the partnership to the extent of cutting wood on a certain lease, dividing the profits between them and sharing the expenses. It is admitted that they continued partners to that limited extent. This is provided for in the deed of dissolution. With regard to Clause 17, which is relied upon by the defendant in his counter-claim, "Without prejudice to the moneys which may be due and owing between the parties thereto," it is to be borne in mind that the partnership did continue, and when the Magistrate gave a verdict for the plaintiff upon the counter-claim, it appears to me that he must, as a matter of fact, have found that this money was advanced to Marshall for the purposes of the partnership, because if he had thought otherwise, he would have given a verdict for the defendant on the counter-claim. Weston in his evidence says, "I have often lent money before and never got it back. Marshall had no money to pay for the carting of the wood; he told me he had no money." There is other evidence in the case, and I think that the Magistrate was justified on the whole in coming to the conclusion, as a matter of fact, that this money was advanced to Marshall for the purposes of continuing the limited partnership. The only effect of our decision is this, that instead of Weston recovering the money on this counter-claim he will have credit for it in the action in which he is plaintiff in this Court. I am of opinion that the Magistrate was right, and that this appeal ought to be dismissed.

PARKER, J. I concur.

MOORHEAD, J. I also agree.

Appeal dismissed.

Solicitors for appellant: *Moss & Barsden.*

Solicitors for respondents: *James & Darbyshire.*

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REX (RESPONDENT).

SKERRETT (APPELLANT).

1902.

May 1.

Hensman, J.
Parker, J.
Moorhead, J.

Quarter Sessions—Embezzlement—Indictment—Ownership wrongly laid—Balance on a general deficiency—New trial.

Question reserved at Quarter Sessions under 50 Vic., No. 15.

The prisoner was charged with having embezzled £261 9s. 4d. in one sum. Two gentlemen, who were alleged to be the prisoner's masters, were shewn at the trial to be simply members of a body incorporated under the Industrial Conciliation and Arbitration Act (64 Vic. 20). It also transpired at the trial that the amount which the prisoner was charged with embezzling was a balance on a general deficiency account extending over a period of six months.

Held, (1) that the property was wrongly laid, and (2) that the indictment was wrongly framed, inasmuch as the prisoner should not have been called upon to account for a number of small sums (expressed in one sum) of which he had no specific notice, and that accordingly the conviction must be quashed. The Court also refused to order a new trial.

V. F. Smith, for the appellant. The property should have been laid in the name of the corporate body and not in the names of individual members. Some specific amount must be proved to have been taken. A general deficiency is not sufficient. *Rex* v. *Lloyd Jones* (*a*), *Regina* v. *Chapman* (*b*), *Regina* v. *Wolstenholme* (*c*).

HENSMAN, J. This is a case stated by the Judge at Quarter Sessions, Kalgoorlie, after a conviction for embezzlement. A number of points were raised at the trial, upon some of which we do not think it necessary to give an opinion. The main points, however, that have been argued by the prisoner's counsel are, first, that the property was wrongly laid. The property belonged to a corporation, and instead of laying the property in the corporation, it was laid in the name of two gentlemen who were members of the society. Now, if application had been made to the Court for leave to amend, it would, no doubt, have been granted, under the provisions of the 14th and 15th Victoria, Cap. 100 (Lord Campbell's Act), which prevents objections of this kind from prevailing, and allows the largest amendments to be made, when there is a variance between the evidence and the indictment, and up to the last moment it was open to the prosecution to have applied, if they could prove their case, to amend the proceedings However, that was not done. I have had some doubt whether,

(*a*) 8 C. & P., 288. (*b*) 1 C. & K., 119.
(*c*) 11 Cox, 313.

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after verdict, this is an objection which should prevail, but, inasmuch as the objection was taken before the case was put to the jury, it must, I think, be upheld. Then the next point was that the indictment was for one sum—a general deficiency of moneys, received by the prisoner. No doubt here again there is room for some argument, because the Courts have given somewhat conflicting decisions on this question, whether there can be an indictment for a general deficiency, but, on the whole, I think the tendency of the Courts nowadays is to confine the indictment to the non-accounting of specific sums. In the present case it appears that for some months the prisoner received various sums of money and at the end of that time there was a general deficiency in his accounts. It appears also, from the evidence, that he ought to have paid all moneys into the bank within forty-eight hours of receiving them. It was open to the prosecution to have charged three separate embezzlements within six months. That is to have had three counts for the embezzlement of moneys at the times when he ought to have paid them into the bank. In *The Queen* v. *Balls* (*a*), Chief Justice Cockburn said, "It is true that each of the small sums received had to be accounted for, but he might well be charged with embezzling the aggregate amount. Evidence of the individual items was admissible to shew how this aggregate was made up." The offence takes place when there is a non-accounting with a fraudulent intent, and, therefore, in the present case, the indictment, instead of being for the embezzlement of one sum, ought to have been for the embezzlement of three different sums within a period of six months. The prisoner's counsel appears to have taken the point before the case was left to the jury, and, therefore, it was open to the prosecution to ask that they might give evidence of three separate embezzlements. I think the way in which the indictment was framed was bad, and it is obvious that it is unfair to a prisoner to be called upon to account for a great number of small sums, of which he has had no specific notice. It would be most difficult for him to meet the case. I am sorry, in one sense, that we are obliged to come to this conclusion, because, from the evidence one is not disposed to quarrel with the verdict of the jury, but, whatever we may think of the merits of the case, we are bound by the law, and on the whole I have come to the conclusion that this conviction must be quashed. Furthermore, although there is

(*a*) 1 C.C.R., 328.

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power in the Court to order a new trial, yet I am of opinion that we ought not to exercise it in this case. It is a provision peculiar, as far as I know, to this State. It has never been the law of England to order a new trial, or a *venire de novo*, after one trial has been held, and I should be very loth to do that unless the circumstances very clearly required it. We have no counsel here on the part of the prosecution to request us to take such a course, or to inform us whether, if we ordered a new trial, he would be able to carry the case any further than before, in respect of the evidence—whether he would be able to satisfy the various points of objection which were taken at the trial. It may be that even if we ordered a new trial the result would be the same, and, therefore, I am of opinion that the Court ought not to order a new trial.

PARKER, J. I concur with the judgment of Mr. Justice Hensman.

MOORHEAD, J. I am of the same opinion.

Appeal allowed—conviction quashed.

Solicitors for appellant: *Jones, Smith & Norris.*

Solicitor for respondent: *Crown Solicitor.*

STEPHENS, INFORMANT (RESPONDENT).

BINGEMANN, DEFENDANT (APPELLANT).

1902.

May 2.

Hensman, J.
Parker, J.
Moorhead, J.

Case stated—23 Vic, No. 3—Medical Act, 1894—58 Vic., No. 36, Sec. 23—"Practice, medicine or surgery"—Chemist—Druggist—Pharmaceutical Chemist.

This was a case stated by the Police Magistrate, Perth, under 23 Vic., No 3. The facts set out in the case were as follows:—At the Petty Sessions holden at Perth, on the 27th November, 1901, an information was preferred by William Stephens against the appellant, under Section 23 of the Medical Act, 1894, charging him that he, not being a medical practitioner and registered under the Act, did on the 13th July, 1901, at Perth, practice medicine by medically treating the eyes of one John William Thompson, and by prescribing a certain lotion for the purpose of curing the eyes of Thompson. The charge was heard and determined by the Police Magistrate, and the appellant was duly convicted and ordered to pay £5 and costs, and in default of payment to be imprisoned for seven days. On the hearing of the information it was proved that on or about the 11th July, 1901, one Edmund Alfred Canning, a friend of Thompson, who was then suffering from bad eyes, saw the appellant and explained to him the malady from which Thompson was apparently suffering, and asked for a prescription for treating the eye. The appellant stated that he could not give a prescription until he had seen Thompson and examined the eye. On Saturday, the 13th July, the appellant examined Thompson's eye and informed him that he had a very severe cold in it. The appellant then put some lotion in the eye and dressed it and bound it up, and made up and gave to Thompson a bottle of the lotion to be used on the eye, and gave him directions as to the manner and the

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times of using the lotion, and placed on the bottle manuscript directions as to the use thereof. The appellant charged Thompson 7s. 6d. The intrinsic value of the contents of the bottle was about ninepence. Thomson did not again see the appellant for eight or nine days, when he called upon the appellant who told him to come in the evening. Thompson did so, and in answer to questions told the appellant that he had apparently lost the sight of the eye. The appellant dressed the eye with a lotion and told Thompson he had better see a doctor, and recommended Dr. Thorp. Thompson did not see Dr. Thorp or any other doctor until the 26th July, when he went to the Perth Hospital, and was treated by the Resident Medical Officer. Thompson's eye got worse from the day on which he saw the appellant first, and his eye was subsequently removed in the Hospital. The medical evidence shewed that there would have been a good chance of saving the eye if the case had been taken in hand by a duly qualified medical man on the 13th July, and that the eye appeared to be suffering from a pus-producing germ of some sort and not from a cold. It was also proved that the lotion used was a solution of boracic acid with one grain of cocaine in a ten ounce bottle, and that, for ordinary opthalmia such as a cold in the eye, boracic acid, with any particular additional treatment that the eye appeared to demand, would do no harm. The case for the appellant was that in acting as alleged by the respondent, the appellant was carrying on the lawful business or occupation of a pharmaceutical chemist, and evidence was adduced on behalf of the appellant that certain chemists in Perth had been in the habit for some years past of attending to what were designated by the witnesses "minor cases" in medicine and surgery. The evidence for the defence did not indicate what a "minor case" was, or afford any standard by which it could be determined, except that of one Mayhew (a chemist), who termed every case a "minor one" which a chemist should not consider a serious one, and of one Webster (also a chemist), who considered that every case which a chemist thinks himself competent to treat he is entitled to treat. It was also contended that the case complained of did not constitute a "practice of medicine" within the meaning of Section 23 of the Medical Act, 1894, under which the charge was laid.

On Appeal.

Held, that there was no evidence before the Magistrate to prove that the appellant was acting otherwise than in the lawful business of a chemist and druggist, and that the Magistrate was accordingly not justified in convicting the appellant.

Burt, K.C., for the appellant. Assuming that what the appellant did was outside the lawful business of a chemist, it does not amount to a "practice of medicine," within the meaning of Section 23 of the Act. It must be proved that the appellant practised continuously and not in an isolated instance. *Apothecaries Company* v. *Jones* (*a*), *vide* Webster's definition of the word "practise."

Pilkington, for the respondent. The business of a chemist or druggist is to dispense and not to prescribe. An apothecary may prescribe, but a chemist must not. 1 *Encycl.*, 267; 2 *Encycl.*, 500. If chemists are to be judges of what are minor cases, they might treat every person who goes to them without breaking the Act. *Apothecaries Company* v. *Greenough* (*b*), *Apothecaries Company* v. *Nottingham* (*c*). The evidence shews that the appellant performed

(*a*) (1893) 1 Q.B., 89. (*b*) 1 Q.B., 799.
(*c*) 34 L.T., 76.

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an act which was part of a continuous and habitual practice. The contention that the information did not disclose an offence, not having been raised at the hearing of the charge, cannot now be argued.

Burt, K.C., in reply.

HENSMAN, J. This is a case stated by the Police Magistrate, Perth, for the opinion of this Court. The facts are very simple. It appears that the appellant was a properly qualified and registered chemist, carrying on his business in Perth, and on the 13th July last a person came to his shop and stated that he thought a cold had affected his eye. The appellant thereupon looked at the eye and gave the man a mixture to apply to the eye, of a simple character; one which is commonly used in such cases, and was quite harmless, that is to say, if it would not do any good it would not do any harm. He further bound up the eye and gave him directions as to the use of the lotion. This was on a Saturday. He told him to come again on the following Wednesday, and in the meantime to use the mixture which would last until that time. The man, instead of coming again on the Wednesday, did not come until the following Monday, and when he came the chemist perceived that his eye had assumed a different phase, and that it was a more serious matter than he first thought it to be. He, therefore, advised him to go at once to a doctor. Instead of going to a doctor the man remained for about four days without doing so, and when he did see a doctor at the hospital the doctor found that the eye had evidently got rapidly worse, and the result was that the man lost the use of his eye. Now it is said that the appellant violated the Medical Act of 1894, and that he was liable to a conviction for that offence. The words of the Act are "That from and after the passing of this Act no person, other than a medical practitioner, shall be entitled to practice medicine or surgery in all or any one of its branches." (There is no doubt this chemist was not a medical practitioner). "Provided that nothing in this section shall prejudice or affect the lawful business or occupation of a chemist and druggist, or of a pharmaceutical chemist." The view that I take of this Act is that the Legislature did not intend to interfere with that which chemists were then lawfully doing—and there is a considerable volume of evidence to shew that for many years chemists and druggists have been in the habit of doing what the appellant did in this case. There is the evidence of Mr. Mayhew, who says, "I

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have been duly qualified as a chemist and have practised for twenty years in this State—in all minor cases of medicine and surgery I have attended to these cases at the doctor's request—it has always been done, and I think all the chemists will say the same." He further says, "It has always been done without interference." Then there is Mr. Hymus, who says that he has practised for 34 or 35 years. He corroborates Mr. Mayhew's evidence, and says that the Medical Board has never interfered. "When a person comes in with a bad eye the usual thing is to examine it and prescribe the best lotion for it. If it is a serious case the practice is to send the case on to a doctor." There were other witnesses, and this evidence was not contradicted in any way. The defendant in this case did nothing more than had been the usage of chemists for many years in this State, and I think that where the Court finds that a usage has been permitted for so long, we may clearly assume that it is not unlawful. These things have been openly done, and there has been no interference with them. It must be obvious that this Act cannot be so strictly construed that a chemist is never to prescribe or to perform the functions of surgery. Suppose the case of a person who is taken quickly into a chemist's shop, who has taken poison. The chemist has to bring his knowledge to bear, and his judgment as to what he shall do with the case, whether he shall administer emetics or an antidote, or shall adopt other means of relief. In many such cases—cases of accident in the street, of sudden illness, of persons seized with fits and so on—it would be contrary to reason if the chemist was not justified in exercising his mind as to what ought to be done at the moment. We cannot draw a hard and fast rule and say that the moment the chemist prescribes or performs some minor act of surgery—such as the extraction of a nail or other substance from a man's hand—he infringes the province of the medical practitioner. We must, I think, look at each case by itself. It has been argued that the moment the chemist begins to prescribe, that is, in other words, to say what drug or lotion he thinks ought to be used, then he infringes on the province of the medical practitioner. I must say that I cannot agree with that view I think that a broad and general distinction (we cannot apply an exact rule), may be taken between the functions of the medical practitioner and the functions of the chemist and druggist. The main object and duty of the medical practitioner is the treatment of disease,

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or if he be a surgeon, operations upon the body, and the supply of medicines or drugs is ancillary to those duties. In the case of the chemist and druggist, his business is to sell his chemicals and his drugs, but at the same time, in order to know what drugs to sell, innumerable instances might be given in which he must use some discretion and judgment for that purpose, otherwise there would be great danger to the customer. Each case must be adjudged on its own merits. It has been said that the intrinsic value of the drugs used was only ninepence. I do not think we are concerned here with what the chemist charged. I am not prepared to say, for one moment, that for what he did and for what he supplied he was over-paid; but if he was over-paid that has no bearing upon the question of whether he acted as a doctor. If a chemist makes an overcharge in his business of a chemist he is still acting as a chemist. It is always to be borne in mind that chemists have to pass an examination, that they are registered and must have a certain amount of knowledge of medical and surgical matters. I am of opinion that the evidence in this case did not justify the Magistrate in convicting the appellant. There was no evidence to prove that he was acting otherwise than in the lawful business of a chemist and druggist. I desire to say one word about the fact that the man lost his eye, because it might appear on the statement of the case that that was due to some neglect or ignorance on the part of the chemist. I do not think that there is any evidence to induce one to come to that conclusion. The man, at the time, appeared to be suffering from a cold. He gave the chemist no reason to suppose there was anything more than that. The chemist gave him a useful and harmless mixture. The man did not use the lotion as directed, he did not see the chemist again on the Wednesday, and he did not go to a doctor for several days after he was advised to do so by the appellant. The doctor may think that he could have cured the eye if he had treated it earlier, but it was not the fault of the chemist that he did not see the man much sooner, and there is nothing to shew that the chemist would have attempted to heal the case when it assumed a more serious aspect. As to the form of the information, it is not necessary to decide the points raised, but I am inclined to the opinion that the information was good.

PARKER, J. I fully confer in the opinion expressed by Mr.

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Justice Hensman on this case, and in all the remarks that he has made on the matter.

MOORHEAD, J. I also concur in the judgment which has been delivered by Mr. Justice Hensman, and I have only to say, with regard to the latter point in connection with the information, that I think the information was properly laid. Each case of this kind must be decided by the surrounding circumstances. If we were to apply that Act literally I think chemists would be obliged to close up their premises, and the general public would suffer to a large extent. The instance suggested by Mr. Justice Hensman shews the absurdity of pressing the Act to a logical conclusion. I do not think it was intended by the Legislature—in fact the very words in the Medical Act, providing that it should not interfere with the legitimate and lawful practice of chemists, shew that what they referred to there was the practice that was being then enjoyed by the chemists in this State. Well, we have it distinctly in evidence here by both Mr. Hymus and Mr. Mayhew that for years prior to the passing of that Medical Act these minor offices were performed here without the interference of any person. Now, if the Legislature intended in any way to curtail the practice of the chemists, I should think they would have inserted some definite and clear language so that there would have been no doubt as to their intention of interfering with a large and influential body of practitioners in this State. I can see nothing in the Act which would lead us to such a conclusion, and I say the instance quoted by Mr. Justice Hensman is sufficient to shew us the absurdity of pressing the Act to what I call a logical conclusion.

Appeal allowed.

Solicitors for appellant: *Moss & Barsden.*

Solicitors for respondent: *James & Darbyshire.*

1902.

May 2.

Hensman, J.
Parker, J.
Moorhead, J.

BEASLEY, APPLICANT.

WRIGHT AND O'DONOHUE, RESPONDENTS.

Quarter Sessions—Chairman sitting alone—Resident Magistrate—9 Vic., No. 4—27 Vic. No. 17.

A Court of Quarter Sessions is not duly constituted unless there be present at the hearing of cases at least one other Justice of the Peace with the Chairman, notwithstanding the latter is either a Police or Resident Magistrate. The Chairman alone is only constituted a Court for the purposes of adjourning it when no other Justice is present. Where, therefore, there has been a sitting by the

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Chairman alone in open Court, he hearing a case, the matter is *coram non judice*, and no assent of the parties can cure the matter. On motion for prohibition under these circumstances

Held, that the writ of prohibition should issue.

On return of the Rule.

The prohibition was asked for on the grounds (1) That the Court was improperly constituted and that the Magistrate had no jurisdiction to hear the appeal, (2) That counsel commented adversely to the accused that he had not given evidence on his own behalf, (3) That certain evidence was wrongfully admitted. The facts sufficiently appear from the judgment of His Honor Mr. Justice Hensman.

Robinson, shewed cause. There is no appeal from Quarter Sessions. The decision of the Quarter Sessions, both on questions of law and fact is final. The wrongful admission of evidence does not affect their decisions. *Regina* v. *Inhabitants of Cottingham* (*a*), *Regina* v. *Justices of Kesteven, Lincolnshire* (*b*). The applicant acquiesced in the proceedings in the Court below and cannot therefore object to the jurisdiction. The applicant voluntarily took his appeal to the Quarter Sessions and was represented by counsel, who took no objection to the Magistrate sitting alone, and is therefore estopped from questioning the constitution of the Court below *Broad* v. *Perkins*, (*c*). The 27 Vic. 17 makes a Resident Magistrate equal to two Justices except in certain cases, but such exceptions were not meant to apply to Resident Magistrates in remote districts of the State.

Downing, for the applicant. The Statute law of the State forbids counsel from commenting, and provides that where that has been done a conviction must be quashed. Only one Justice sat on this case, whereas in Quarter Sessions it was essential that two or more Justices should sit. The Court below having acted irregularly in its proceedings, prohibition will lie.

HENSMAN, J. This is a rule for a prohibition which has been applied for directed to J. A. Wright, Esquire, of Albany, and one O'Donohue, to prevent them from further proceeding with an order made by the Court of Quarter Sessions at Albany recently. It appears that the applicant, Beasley, was prosecuted before the Justices in Petty Sessions for an offence against some recent Act, with the result that he was ordered to keep the peace for some time, and to pay a certain sum for costs. Beasley appealed to the

(*a*) 2 A. & E., 250. (*b*) 3 Q.B., 810.
(*c*) 21 Q.B.D., 533.

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Court of Quarter Sessions—as he was entitled to do—and that Court, which was attended by solicitors or counsel on both sides, was composed of Mr. Wright in the chair. No objection was taken at that time to that constitution of the Court by either counsel, and Mr. Wright confirmed the order which he had previously made, and ordered Beasley to pay the costs of the appeal. A few days afterwards, steps were taken to apply for a prohibition. Other grounds were mentioned, to which it is not necessary to refer, but the main ground, upon which we are now about to give our decision was that the Court was improperly constituted and that it was necessary, in order to constitute a Court of Quarter Sessions, that there should be a chairman, and at least one other Justice of the Peace. The case depends upon two Statutes. The first is the 9 Victoria, No. 4—an act to make provision for the trial of criminal offences at Albany and other remote districts of the State. It in effect constitutes Courts of Quarter Sessions, and it says that the Courts so appointed shall be Courts of record, and shall be held before any two or more Justices of the Peace of the State, whereof the chairman or deputy chairman, as thereinafter mentioned, shall be one, and shall have power to hear appeals and other matters. Then it goes on to say that the Governor may nominate any Justice of the Peace to be chairman. Further it is enacted that in any case in which the required number of Justices is not present, any one Justice, whether he be chairman or not, shall be constituted the Court for the purpose of adjourning it. If that Statute stood alone, it must be obvious that there should be a chairman and one other Justice of the Peace at least, in order to constitute a Court of Quarter Sessions. But reliance has been placed by counsel on a later Act—the 27 Victoria No. 17, entituled, "An Ordinance to extend the jurisdiction of the Police and Resident Magistrates." That enacts that it shall be lawful for any Police or Resident Magistrate to do any act directed to be done by more than one Justice of the Peace. But then occurs a proviso that no such Police or Resident Magistrate shall be competent to act alone in anything required to be done by Courts of Petty Sessions or any general Sessions of Justices of the Peace. It appears to me quite clear that that Act, when it gave a Resident or Police Magistrate power to do what otherwise should be done by two Justices of the Peace, intended specially to except the Courts of Quarter Sessions. In point of fact, the chairman of Quarter Sessions is not necessarily

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a Resident or Police Magistrate. It is open to the Governor to appoint any Justice of the Peace to be the chairman of the Quarter Sessions, and, probably, it is the fact that Quarter Sessions are held at places where there are not Resident or Police Magistrates However, be that as it may, I am clearly of opinion that the Court of Quarter Sessions on this occasion was wrongly constituted, and in other words, that the case was *coram non judice*. Yet, although that be so, this Court has a discretion as to the writ of prohibition, and the question is as to whether it ought to grant the writ, because the parties allowed the case to be heard without taking objection, and, consequently, may be said to have waived the question of want of jurisdiction. Upon a consideration of the authorities, we find it generally laid down that where the want of jurisdiction is apparent upon the face of the proceedings the Court should not exercise its discretion, but only in cases where there has been some lying by to see how the case results, and then the Court will say that the party is not entitled to the writ. The first case to which I will refer is that of *Buggin* v. *Bennett*, reported in 4 Burrowes' Reports. There Lord Mansfield said:— "If it appears on the face of the proceedings that the Court below had no jurisdiction, prohibition may be issued at any time, either before or after sentence, because all is a nullity; it is *coram non judice*. But where it does not appear on the face of the proceedings, if the defendant below will lie by and suffer the Court to go on under an apparent jurisdiction, it would be unreasonable that this party, who, when defendant below has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there and suggest that collateral matter as a cause of prohibition, and obtain prohibition upon it." (His Honor then read the dicta in the following cases: *Knowles* v. *Holden* (*a*), *London Corporation* v. *Cox* (*b*), *Farquharson* v. *Morgan* (*c*). At the commencement of this case, I think myself, or one of the Judges, asked what the applicant wanted to prohibit, and it turned out that what is really the substance of the matter is that the costs had not yet been paid. Had the costs been paid, probably the Court would not have been asked to interfere. Now, it was suggested that here the want of jurisdiction did not appear on the face of the

(*a*) 24 L.J. Exch., 223. (*b*) L.R. 2, H.L., 239.
(*c*) 63 L.J.Q.B., 474.

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proceedings, because the order of the Court is signed by the Judge. That may be, perhaps, the usual way in which those orders are signed, but I do not myself limit the meaning of the expression that it is apparent on the face of the proceeding. I think a case of this kind is very rare. As a rule, the want of jurisdiction appearing on the face of the proceedings in all the cases which occur is not that the Court is not properly constituted, but that there is something outside the jurisdiction. For instance, in County Courts in England there must be a Judge sitting, and at Quarter Sessions in England no one ever heard of one Judge sitting by himself. The Court is suspended if no other Justice can be found to sit by the side of the Chairman. The cases in England upon which the authorities run are in questions in County Courts, where perhaps a question of title may come up, which is not apparent, and which is kept back by the party; or where, for instance, the cause of action arises out of the district. Now in these matters it is obvious that the fact may not appear on the face of the proceedings. But where we have a Magistrate sitting in open Court, and it is obvious to everyone entering that Court, if they know the law, that he is not competent to sit by himself, it is an obvious want of jurisdiction which no assent on the part of the parties can cure. Therefore, the view I take is that this rule ought to be made absolute.

PARKER, J. I concur in the judgment delivered by the learned Judge.

MOORHEAD, J. I also agree with the decision of the learned Judge, and after his exhaustive judgment it is hardly necessary for me to go over the same ground. I am clearly of opinion that where there is no jurisdiction, we cannot confer it in this Court. All the cases which are reported practically shew that the discretion of the Court is exercised only in those cases where there has been a mere irregularity—where there has been an original jurisdiction, but there has been a departure from some of the rules of procedure, for instance, in a case where it is necessary to serve an order and the order has not been served, and the parties have consented to the hearing—in such a case as that the Court will exercise its discretion and refuse prohibition. But where there has been no jurisdiction whatever conferred by the Act which brings the Court into existence, then the Supreme Courts have interfered. Now, in no instance do we find the Courts of Quarter Sessions in

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England presided over by one Magistrate who is known as the Chairman. If that is the case in England, there is all the more reason why we should here jealously guard the jurisdiction of these inferior Courts. We all know that in this State the Chairman of Quarter Sessions is, in nearly all cases, the Resident Magistrate. That Resident Magistrate is the committing Magistrate in all cases, and he is the Magistrate who prepares the information that is subsequently presented, and it would be an extraordinary thing if we were to close our eyes and to allow that gentleman to sit alone in judgment at Quarter Sessions. We should, therefore, all the more jealously guard the privileges of the citizens and the prerogatives of the Crown. Now, it was incidentally mentioned that the honorary magistrates in this particular district refused to sit, and a very good idea was given to the Bench as to the reason of that. Well, I must strongly condemn such action. As a rule, the honor of His Majesty's Commission of the Peace is conferred upon men distinguished in the community for probity and for the uprightness of their character—men who will properly administer the laws of the country, and I think in this instance, where it has been directly intimated to this Court that these gentlemen refused to sit because of the danger of damage that might ensue to their business, the matter is to be strongly condemned. I hope a similar instance will not again come before the notice of this Court. I attach no blame whatever to the Resident Magistrate, because he endeavored to get the Bench together.

Rule made absolute, with costs.

Solicitors for applicant: *Haynes, Robinson & Cox.*

CLAZY, APPLICANT (APPELLANT).

THE REGISTRAR OF TITLES (RESPONDENT).

1902.

May 5.

Hensman, J.
Parker, J.
Moorhead, J.

Transfer of Land Act, 1893, *Secs.* 82-85; *Sec.* 203; *Secs.* 143-145; *Sec.* 238—*Power of attorney—Registration of transfer—19th schedule.*

Summons adjourned from Chambers by Moorhead, J., to the Full Court, in which the Registrar of Titles was called upon to shew cause why he should not register a transfer of certain land from G. R. Clazy to Mary Paterson.

The applicant, being the registered proprietor of the land, proposed to transfer it by means of a transfer signed by his attorney. The power of attorney was dated 19th November, 1898, and it conferred full general powers on the attorney to do all such acts, matters and things as might be done by the principal if personally present, but it was not in

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accordance with the form provided in the Transfer of Land Act, 1893. The Registrar of Titles refused to register the transfer, and the Commissioner of Titles was thereupon requested, under Section 203 of the Act, to state his reasons for not recommending the registration. The Commissioner's answer was as follows:—"Apart from the Transfer of Land Act, the vendor is expected to personally execute the conveyance, and execution by an attorney is only exceptional, and the power of attorney is usually attested by the purchaser's solicitor or his agent. Under the Act the vendor is *prima facie* the party to execute the transfer, and execution by an attorney is only exceptional, and can only be done by virtue of the indulgence contained in Sections 143 to 145, which is granted under conditions with which Mr. Clazy has not complied. Under the ordinary conveyancing system I have never known such a power of attorney as that executed by Mr. Clazy to be accepted by a purchaser or by his solicitor or counsel, nor have I known such a deed acted upon under any Transfer of Land Act."

Held, that the Registrar and Commissioner were right in declining to transfer the land in question.

Dr. Smith (Commissioner of Titles) shewed cause: The power of attorney is not in the form or to the effect provided by the Act in the 19th schedule thereto. The relation of principal and agent is not created by it, but it attempts to convert the presumed agent into a principal. The deed, to be effective, should have contained the words: "and sell any of my property under the Transfer of Land Act and transfer the same." It was only by the Act that a vendor became entitled to compel the purchaser to take a conveyance, signed by an attorney under power. Before the Act the purchaser was not bound to be satisfied with any conveyance not executed by the principal, unless the vendor gave satisfactory evidence, not only that the power was genuine, but that he could not personally execute the conveyance. See *Noel* v. *Weston* (*a*), *Mitchell* v. *Neale* (*b*). Then comes the Transfer of Land Act, which gives the vendor the indulgence of executing by an agent, if appointed in a certain form, and the form must be substantially complied with.

Pilkington, for the appellant. The object of the power was to confer a general authority as agent. If the special words suggested had been put in, they would have had the effect of limiting the general power. Apart altogether from Section 143, any document may be executed by an agent duly authorised, and the execution is the same as execution by the principal, unless there is something in the Statute to prohibit execution by an agent. *In re Whitley* (*c*). Section 144 provides for the admission

(*a*) 6 Mad. 50. (*b*) 2 Vesey, 679.
(*c*) 32 Ch.D. 337.

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of a power of attorney executed prior to the passing of the Act, and when, therefore, the words in the schedule could not be followed. Section 238 prevents any variation from forms in the schedule (not being a matter of substance) from affecting the validity or regularity of documents. There are cases in connection with the Companies' Act which shew that general words confer a power to deal with land by way of mortgage. *In re Patent File Co.* (*a*).

HENSMAN, J. In this case the Court has to decide whether the Commissioner and Registrar were right in refusing to receive this power of attorney as authorising the transfer of the land from Clazy to a purchaser. Section 82 of the Act says that the proprietor of a lease, mortgage, or charge, or any other estate, right, title, or interest, may transfer the same in one of the forms of the schedule. The form in the schedule is: "I ....., being registered as the proprietor of an estate in fee, do hereby transfer." This is only required to be signed by the transferor. Section 85 says that every transfer or other instrument shall be deemed of the same efficacy as if under seal, and, when signed by the proprietor, shall be valid and effectual, to all intents and purposes, for conveying the land. By Section 143 it is enacted that the proprietor of any land under the Act may appoint any person to act for him in transferring the same, or otherwise dealing therewith, by "signing" a power of attorney in the form of the 19th Schedule thereto, or to the effect thereof, and such power, or a copy, has to be filed with the Registrar. When we turn to the 19th Schedule we find a form: "I, A.B., do hereby appoint ..... my attorney to sell the lands ..... now belonging to me or which shall hereafter belong to me, under or by virtue of the provisions of the Transfer of Land Act, 1893"; and a number of other powers are added—power to mortgage, power to lease, and so on, but all refer to lands belonging to the party under or by virtue of the Act. We have before us a power of a most unusual kind. "I, George Robert Clazy, mining engineer, do hereby nominate Mr. Pilkington, solicitor, to be my attorney to represent me in all the Australian colonies, Tasmania, New Zealand, etc." If it stopped there it does not seem to me that it would be a very unnatural reading to say that he only appointed Mr. Pilkington

(*a*) L.R, 6 Ch. 83.

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to represent him in his business of a mining engineer. It goes on (I am not reading the whole of it): "I give him every power which it may be possible to confer upon an attorney, and so that, as far as possible there shall be nothing which I can or might be able to do if personally present which may not be done under the authority of these presents, and I undertake to ratify and confirm whatsoever he shall do." This was the power which was brought to the Registrar as an authority by Clazy for the transfer of this land. In "Story on Agency" it is stated (I read it because it summarises the law in such a very clever manner): "A special agency properly exists when there is a delegation of authority to do a single act. A general agency properly exists where there is a delegation to do all acts connected with a particular trade, business, or employment." And then the writer goes on: "It may perhaps be well to add (what indeed has been already intimated) that general agents are to be carefully distinguished from universal agents—that is, from agents who may be appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. Such an universal agency may potentially exist, but it must be of the very rarest occurrence, and, indeed, it is difficult to conceive of the existence of such an agency practically, inasmuch as it would be to make such an agent the complete master, not merely *dux facti*, but *dominus rerum*, a complete disposer of all the rights and property of the principal. It is, however, certain that the law will not from any general expressions, however broad, infer the existence of any such unusual agency, but it will construe them as restrained to the principal business of the party in respect of which it is presumed his intention to delegate the authority was principally directed." The decision which I propose to give for myself does not turn upon the exact construction or meaning to be given to this power of attorney, but it might, I think, be argued with some degree of force that this power of attorney rather refers to everything which the party might do in his business of a mining engineer, and the text which I have quoted, and which is supported by authorities, seems to bear out that view. However, the ground upon which I base my decision is this, that there is a special Act which gives persons the right, if they go through certain forms, to get a Statutory title, and

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it gives power to convey land, not by instrument under seal, but by mere signature. It gives further power to a proprietor to transfer the same under a power of attorney, that is provided the power of attorney is in the form given in the Act, or to the effect thereof. Now, this power of attorney is clearly not in that form, nor, to my mind, to the like effect. As a matter of fact it is signed, sealed, and delivered, which would appear to shew that it was not intended to operate under this Act, because signing alone is there necessary. However, to pass that by, the power of attorney in the schedule is distinctly directed to dealing with lands registered under the Act. That is its scope, and I think the words, "and to the like effect," mean that although it is not absolutely necessary to follow that exact form, yet the power of attorney must substantially be as it is in the schedule. This is not a hardship upon anybody. I think it would be very dangerous for the Titles Office to accept such strange, or at all events, such unusual powers of attorney as that in question. At most, I think, it must be construed as a power of attorney to do that which the party could do in the course of his principal business. It was never intended that the duty should be put upon the Registrar or the Commissioner of forming an opinion in which they may be mistaken, or upon which others may take a different view, as to the meaning of strange and eccentric powers of attorney. I think the Act imposes upon them a duty to see that the powers of attorney which are filed in the office are in substance similar to those which are set forth in the Act. For these reasons I am of opinion that the Registrar and Commissioner were right in declining to transfer this land. With regard to the case, that had been quoted, of *In re Whitley*, I will only say one word. It does not appear to me to be applicable to the present case. It was a case in which the Companies' Act said that any seven or more persons might subscribe to a memorandum of association, and there was nothing in the Statute which shewed that anything special was intended in the mode of signature, but that the general rule of law could be applied, namely, that a man might sign for another as his agent.

PARKER, J. I concur in the view expressed by Mr. Justice Hensman.

MOORHEAD, J. I also concur in the views of Mr. Justice Hensman. I may say that I had no doubt whatever from the outset

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with regard to this matter, but I thought that as it was a test case and of great importance that it would be more satisfactory to the parties to have it referred to the Full Court.

Appeal dismissed.

Solicitors for the appellant : *James & Darbyshire.*

1902.

June 23.

Hensman, J.
Moorhead, J.

ELLIOTT, JUDGMENT CREDITOR (APPELLANT).

McBEAN, BOWKER & CO., CLAIMANTS (RESPONDENTS).

ASHLEIGH (JUDGMENT DEBTOR).

Local Court—Interpleader—Goldfields Act, 1895, *Secs.* 11, 12 *and* 13—*Bills of Sale Act,* 1899, *Sec.* 25—*Apparent possession—Reputed ownership—Evidence of ownership—Registration—Business area—Fixtures.*

Appeal from the decision of the Resident Magistrate at Kanowna, on an interpleader issue. The appellant recovered judgment against the defendant (Ashleigh) in the Local Court, and issued execution against him. The bailiff, acting under the warrant of execution, seized a business area, which was registered in the books of the Warden's office in the name of the defendant. Upon this area was erected a certain building which was kept by the defendant as a hotel. The respondents claimed the building, and also claimed the stock and furniture which they held under a bill of sale. At the hearing, evidence (which was uncontradicted) was given by the defendant that the building was not his property, and had never been so, but that it was the property of the respondents, and it was also proved that the stock-in-trade and furniture was also the property of the respondents under a bill of sale. The Magistrate found in favor of the claimants with costs, and ordered that the building be restored to them. The grounds of appeal were :—(1) That the verdict was against the weight of evidence. (2) That the defendant's evidence as to the building had been improperly received. (3) That the judgment as to the building was bad in law for the reason that the defendant was the reputed owner thereof. (4) That the Magistrate was wrong in holding that documentary evidence was not necessary to establish the respondents' title to the building. (5) That to establish respondents' title thereto, a mortgage or lien should have been duly executed by the defendent in favor of the respondents and registered.

Held, that the building was a chattel within the meaning of the Bills of Sale Act, 1899, and that the Magistrate rightly decided that it was the property of the respondents.

C. Mann, for the appellant. The business area, upon which the building stood, is an "authorised holding," and no dealing therewith is good unless registered in the office of the Mining Registrar ; 59 Vic., No. 40, Secs. 11, 12 and 13 of the Act are to this effect. The evidence is that the business area belonged to the defendant. If the building was a fixture on the land it would follow the land. *The Great Hannans Aurora Co.* v. *Barnes* (*a*). If the building was removable it was a chattel within the meaning of the Bills of Sale Act, 1899, and should have been included in the bill of sale of the

(*a*) W.A.L.R., p. 1.

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stock-in-trade and furniture. Not having been so included, under Section 25 of the Act the bailiff is impowered to seize the building as being in the apparent possession of the defendant.

Hensman, for the respondents. The building was not a fixture. The evidence of Ashleigh points to the fact that it was movable, and that it had formerly been situated some five miles distant from its present position, to which it had been removed. Section 19 of the Goldfields Act gives power to the holder of a business area to remove buildings thereon, and the Act contemplates that any buildings erected on such areas do not become fixed to the soil but remain always movable Section 13 relied upon by the appellant does not apply to a building, but to a lease, reward claim, alluvial claim, or other authorised holding. The building, therefore, being a chattel within the meaning of the Bills of Sale Act, there is nothing to prevent a verbal agreement being good, whereby one man remains in possession of a chattel, the property of another. The law does not require the existence of a bill of sale in such a case. Under Section 25 of the Bills of Sale Act, 1899, the Sheriff is only empowered to seize chattels in the possession, or apparent possession, of the grantor, which are the subject of a bill of sale which is not in compliance with the Act, by reason of non-registration, and is therefore to be deemed fraudulent and void. There was uncontradicted evidence that the building was the property of the respondents, and this evidence was properly admitted by the Magistrate. The Bills of Sale Acts have no application in this case because they deal with documents, not transactions. *North Central Wagon Co.* v. *Manchester and Sheffield Railway* (*a*). *Charlesworth* v. *Mills* (*b*). *Haydon* v. *Brown* (*c*).

Mann, in reply.

HENSMAN, J. I am of opinion that this is a clear case and that the Magistrate was right in his decision; that is to say, that having found as a fact that McBean, Bowker and Co. were the owners of the structure in question, there was nothing to shew that he made any mistake in the law bearing on the matter. We cannot here discuss the question of the weight of evidence, but the facts, as I understand them, are these: An execution took place and, among

(*a*) 35 Ch. D., 191. (*b*) 1892, A.C., 231.
(*c*) 59 L.T., 810.

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other things, a building which was a movable structure was seized. It appears that the occupier of the building was a publican, and that he had assigned the furniture and the stock-in-trade to McBean, Bowker & Co., but he stated in his evidence—and that was the only evidence which the Magistrate had to act upon—that the structure in question was the property of McBean, Bowker & Co. It is true that he stated in one portion of his evidence "I paid no rent," and afterwards "I did pay rent for the building," but we must read that evidence with regard to the finding of the Magistrate. He took it, evidently, that at the time of the seizure Ashleigh was not paying any rent, although he had previously done so, but Ashleigh distinctly stated that the building was the property of McBean, Bowker & Co., and never had been his (Ashleigh's). That being so, is the case one in which it was necessary to register this building under the Goldfields Act. I am of opinion that the Goldfields Act has no application. This was not an authorised holding, or a claim or interest which required registration under the Act. "Authorised holding" is defined as being a holding of whatever kind other than a lease or claim lawfully held under the Act. No doubt if this building had been attached to the soil, so as to form part of the claim or business area, then by Section 11 of the Act no transfer could have taken place without being registered. In the first place however, there is no evidence that the building ever was transferred; and secondly, it was not an authorised holding which required to be registered under the Act. It has been said, however, that it ought to have been registered under the Bills of Sale Act. The Bills of Sale Act, as its title implies, is intended for the purpose of the registration of documents. The definition shews what documents are bills of sale, and then Section 25 says that every bill of sale, in so far as regards the property or any chattels comprised in such bill of sale, shall, as against the Sheriff, be void unless duly registered. In the present case, the title of McBean Bowker & Co. is not under any document or bill of sale. The evidence is that this building, which is movable, belonged to them. It might as well be said that every time a person who owns a chattel deposits it on the land or in the house of another person, the Sherift can come in and seize on a judgment against the latter. That is not so. If the property is transferred to the person upon whose land it is put, by a document, and that document is necessary in order to prove the title, then it is other-

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wise. In the present case the evidence is that the structure belonged to McBean, Bowker & Co., and that it was on land held by Ashleigh. The Sheriff can only seize the property of the execution debtor. Therein his rights differ from those of a landlord, who can in many cases seize things which are not the property of the person distrained upon, but which happen to be on his premises. What the Bills of Sale Act says is this: That if there has been a transfer, and the title of the transferee depends upon a bill of sale, that bill of sale must be registered. Here the title of McBean, Bowker & Co. does not depend upon any document. The evidence is that the building of McBean, Bowker & Co. is upon the land occupied by Ashleigh, and that the Sheriff seized it. Under these circumstances I am of opinion that the Magistrate was right, and that this appeal must be dismissed.

MOORHEAD, J. I agree with the judgment which has just been delivered. I would like to point out that it appears from the evidence, which has been very briefly given to us by the Magistrate, that this hotel had been erected at some other place and had been subsequently removed by the defendant in the action (Ashleigh) to a new site, and that a bill of sale had been given by the defendant over the stock-in-trade and the furniture. Now, Mr. Mann says it may be argued that there was no necessity for giving a bill of sale over the stock-in-trade and the furniture, if the contention of Mr. Hensman is correct. I see nothing in the evidence to suggest that the stock-in-trade and the furniture had not been purchased outright by Ashleigh, and was his property. On the other hand the Magistrate found, and I think there is evidence sufficient to warrant his finding, that the hotel itself was the property of McBean, Bowker & Co. That being so, I am of opinion that there is no law which would tend to defeat a man's title to his own property because it remains in the possession of a third party who has not given a bill of sale over it. It would be absurd to imagine such an effect. At any time the law gives the right to a party who has purchased property which is not taken under bill of sale, to come in and prove his title to it. The title to goods over which a bill of sale is given depends upon the bill of sale, as to the date of the registration, and its compliance with the terms of the Act. In this instance, it was perfectly competent for the parties to come in and prove their right at Common Law irrespective of their

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rights under any document. I therefore agree with my brother Hensman.

Appeal dismissed with costs.

Solicitors for the appellant: *Stawell & Cowle*, Agents for *W. J. Bonnin*, Broad Arrow.

Solicitors for the respondents: *Nicholson & Hensman.*

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June 24.

Hensman, J.
Moorhead, J.

MANOLAS (PLAINTIFF), APPELLANT.

W. J. KIFFIN THOMAS AND CO. (DEFENDANTS), RESPONDENTS.

Local Court—Small Debts Ordinance, 1863, *Sec.* 8—*Question of title—Jurisdiction—Trespass—Detention—Landlord and tenant—Reasonable notice—Ejectment.*

Appeal from a judgment of the Local Court, Perth. The respondents were the lessees of the Perth Public Markets, and the appellant was a sub-lessee of two stalls therein, numbered 79 and 81. The appellant had been in possession of these stalls from the time the markets were opened, a period of three or four years. He held stall 81 under an agreement in writing for nine months, with an option of renewal from time to time; he held stall 79 on a weekly tenancy, the rent being payable in advance. On February 3rd, 1902, the appellant paid rent for the week ending February 10th. On the 8th February the respondent Thomas came to the appellant's stall, 79, at 10 o'clock in the morning, and told him he would have to leave by 12 o'clock noon. The appellant protested, but at noon the respondent's servants ejected him from the stall, and removed his goods to some vacant land. Thereupon the appellant brought an action in the Local Court for trespass. The Magistrate held that inasmuch as the title to land came into question within the meaning of the Small Debts' Ordinance, 1863, Sec. 8, he had no jurisdiction. This decision was appealed from upon the following grounds:—(1) That the Magistrate was wrong in deciding that he had no jurisdiction. (2) That the plaintiff's claim being, *inter alia*, for the return of certain goods, or their value and damages for detaining the same, the Magistrate was wrong in deciding that he had no jurisdiction, and should have adjudicated on the claim. (3) That there existed, on February 8th, the relation of landlord and tenant between the plaintiff and defendant. (4) That the plaintiff was entitled to reasonable notice from the defendant before the goods could be removed from stall 79. (5) That the defendant was not justified in removing the plaintiff's goods to the vacant land, and should have returned them to the plaintiff on demand. (6) That the defendant was not justified in forcibly removing the plaintiff's goods, but should have brought an action for ejectment.

Held, that the question of title arose *bonâ fide* on the hearing of the case before the Magistrate, and that he was, therefore, right in holding that he had no jurisdiction to decide such question.

H. P. Downing, for the appellant. The Magistrate was wrong in deciding that he had no jurisdiction, because the question of title did not arise. It was not denied that the relationship of landlord and tenant existed, but the appellant said he was a weekly tenant, whereas the respondents said he was a tenant at will. If the question of title did arise, it was not a *bonâ fide* defence, but merely an illusory one, raised in order to try and deprive the Local Court of

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its jurisdiction. There was no real and *bonâ fide* dispute on the question. Whether the appellant was a tenant at will, or a weekly tenant, he was entitled to reasonable notice before being turned out. *Pearson* v. *Glazebrook* (*a*), *Latham* v. *Spedding* (*b*).

R. S. Haynes, for the respondents. There was a conflict of testimony as to the nature of the tenancy, appellant alleging a weekly tenancy and respondent a tenancy at will. If, therefore, the Magistrate decided that there was not a weekly tenancy he would inferentially be deciding that there was a tenancy at will, and thus adjudicating upon a question of title. The point as to reasonable notice to quit could not arise until the Magistrate had come to the conclusion that appellant was a tenant at will. In order to do that he would have to decide that he was not a weekly tenant, when the question of title would equally arise. Appellant wrongly brought his action in the Local Court, and has since sought to cure his mistake by instituting a suit in the Supreme Court, wherein the cause of action is identical with that in the Local Court. *Tompkins* v. *Jones* (*c*), *Chew* v. *Holroyd* (*d*).

Downing in reply. *Chew* v. *Holroyd* is not in point. No question of title was raised at all material to the issue. *Lilley* v. *Harvey* (*e*).

HENSMAN, J. In this case the plaintiff sued the defendant in the Local Court for the recovery of £100. He alleges that he was a tenant of the defendants of a stall in the Perth Public Markets, or that he was otherwise entitled to the use and occupation of such stall, and to the quiet possession and enjoyment thereof. Then the plaintiff goes on to allege that the defendant broke and entered the stall and wrongfully carried away the plaintiff's goods. It would therefore appear that really the claim of the plaintiff was that he was, at the time when the goods were carried away, the tenant of the defendant or was otherwise in the lawful occupation of this stall. It appears to me, therefore, that the question of title arose. The plaintiff alleged that he had occupied this stall for some time and had paid £1 17s. 6d. a week for it, and that he rented this stall from the defendant. The case is a little complicated by reason of the plaintiff being the

(*a*) 37 L.J., Ex. 15.
(*b*) 17 Q.B., 440.
(*c*) 22 Q.B., 599.
(*d*) 22 L.J., Exch. 95.
(*e*) 17 L.J.Q.B., 357.

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occupant of another stall adjoining. The defendant, on the other hand, swore before the Magistrate that the tenancy only existed as to the other stall, and that with regard to stall 79—the one upon which the goods were seized—it was occupied by the plaintiff in this way: He says that he made an arrangement with the plaintiff and said to him, "You can put your things there if you will promise me that you will never do any cooking, and will consent to move immediately upon request." Therefore, there was a clear difference between them. Mr. Downing, in the able argument he has given the Court, has endeavoured to shew us that the evidence was overwhelming in favor of the plaintiff's view of the case. As the case will probably come before this Court at *Nisi Prius* on some future occasion, I desire to say nothing which will prejudice the hearing of that case. It may be that Mr. Downing's argument will turn out to be correct and that the facts and evidence before the Court were strongly in favor of the plaintiff's view. But, even if that be so, it does not appear to me to alter the position of the case. Title equally, it appears to me, arose. Was the occupation a weekly one, or was it one at will or on sufferance? A great deal has been said, and properly said, as to the letter of February 6th, in which the defendant wrote to the plaintiff, "should it be necessary for your removal from the stalls occupied by you to any other position in the market upon receipt of twenty-four hours' notice, you must remove all your property . . . . and you are hereby notified that your tenancy is a daily one, and not weekly as hitherto." I think it was open to the Magistrate to receive evidence that the word "stalls" in that letter was a mistake, and that it only referred to one of the stalls. Then it has been said that this setting up of title was not *bonâ fide*. But it was a question which might arise. It was capable of existing at law. It is quite open for one man to say to another, "You may put your goods on those premises provided you remove them as quickly as possible upon notice." Even supposing that this Court was of opinion, as has been argued, that the Magistrate had a right to decide what notice should be given, and assuming that the Magistrate held that it was a tenancy at will and that the goods must be removed upon a reasonable notice, I should not have liked to say that two or three hours was not a reasonable time, considering that the plaintiff was about at the time, and might have removed them if he thought fit, and that, in fact, the goods were

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removed in two or three hours. However, I do not propose myself to give any opinion upon those matters. Although I must say that the matter has been well put by Mr. Downing, and has given rise to some consideration, still I must be of the opinion, as I have been throughout this case, that title did arise. Well then, that being so, the Magistrate was right, I think, in saying that he did not have jurisdiction to decide it. On the whole, it appears to me that it is decidedly for the benefit of the plaintiff that his claim on this matter should be tried together with his claims in respect of the other stall, and, therefore, I propose to express no opinion upon the facts of the case. It has been said that the conduct of the plaintiff was very autocratic and high-handed. That will have to be decided by another tribunal. My opinion is that the title did arise, and that it arose *bonâ fide* in the sense that it was set up by the defendant, and that it was a defence which was capable of being set up in point of law. I may say that Mr. Justice Moorhead agrees with me on the point which I am now going to mention, that is, we consider that we shall be doing justice in this case if we reserve the question of costs until after the hearing of the action pending in this Court. We have both considered that, and we have decided to reserve the question of costs until the trial of the other action. Of course, if the other action does not proceed within a reasonable time, it will be open for the defendant in this case to move for final judgment. The decision of the Court will be that the appeal will be dismissed and the question of costs will be reserved.

MOORHEAD, J. I agree with the judgment which has been delivered. I think there was a question of title and that the Magistrate was right in not giving a decision upon it. As to the question of whether the defence was *bonâ fide*, I think that is purely a matter, in a case of this description, which arises on the state of the facts and the evidence given. I see nothing here which would warrant us in saying, at this stage of the proceedings, that such a defence has been suggested by any evidence which has been given in the Court below. I thoroughly approve of the reservation of the question of costs, and I expressly desire not to say anything with regard to the action, from what has been given in evidence, as possibly the action may come before me.

Appeal dismissed.

Solicitors for appellant: *Ewing & Downing.*

Solicitors for respondents: *Haynes & Purkiss.*

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1902.
July 31.

The C. J.
Hensman, J.
Moorhead, J.

COUCHE, CALDER AND CO. (PLAINTIFFS) RESPONDENTS.
CONDIT AND LAUNDER (DEFENDANTS) APPELLANTS.

Sale of Goods Act, 59 *Vic.*, 41—*Agreement—Agency—Parol evidence—Warranty.*

A traveller or agent for the respondents agreed with the appellants to supply to them 250 penknives having an advt. on them. At the time the agreement was made a sketch was produced shewing the style of penknife. The agreement for purchase was contained in the following letter from the appellants to the respondents :—"Please procure for us 250 advertising penknives bearing our advertisement on both sides for which we agree to pay the sum of £26 os. 10d. f.o.b. New York, plus freight, duty and other charges which, as before, you are to arrange as reasonably as possible. The above mentioned goods must be in our hands not later than the 1st December this year. Payment to be made against delivery of these goods." On arrival of the goods the appellants refused to take delivery stating that they were inferior to the quality ordered. In an action in the Local Court at Perth the Magistrate refused to admit evidence that the penknife ordered was of a different kind to that expressed in the agreement, and gave judgment for the plaintiffs (respondents).

Held, That the Magistrate was right.

On Appeal.

Durston, for appellants. The Magistrate should have admitted evidence as to quality. The agreement does not contain all the terms of the contract, there being no statement as to quality or material. Parol evidence should have been admitted. *Heilbutt* v. *Hickson* (*a*), *Gillespie Bros.* v. *Cheney, Eggar and Co.* (*b*).

Barker, for respondents. The plaintiffs were really agents for the defendants in the purchase of these articles. The contract is clear. If the description on advertising slip were intended, it should have been referred to in the order or agreement. Evidence cannot be admitted to vary this agreement. The only action which could be taken by the defendants would be under Section 52 of the Sale of Goods Act, 1895. Even if they succeed on this it is only a question of a reduction in price. Further, Order 55, Rule 4, now gives this Court power to deal with the whole case. *Kain* v. *Old* (*c*).

Durstan, in reply.

STONE, C.J. I am of opinion that this appeal should be dismissed. It appears that the defendants had a transaction with one Eastman, the agent of the plaintiffs, whereby they had purchased certain advertising matchboxes, of a description now in Court.

(*a*) L.R. 7, C.P. 438. (*b*) (1896) 2 Q.B. 59.
(*c*) 2 B. & C. 627.

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These boxes appear to be described in the slip or advertising paper as white crystaloid. The defendants were well satisfied with these articles, and afterwards approached the agents with a view of purchasing something else which they could distribute gratuitously at Christmas time, and they were shewn another advertising slip with a picture of a penknife upon it. It is not stated in the advertising slip that the advertisement is made of white crystaloid, the expression which was used with regard to the matchboxes; but the defendants clearly understood or inferred that the material on the knife was similar to that which they had had upon their matchboxes, and believing that to be so, they ordered a certain quantity from the agent of the plaintiffs. That order was put into writing in the terms of the letter which we have read. Now, I think this transaction was clearly a sale of these articles by the agents of the plaintiffs to the defendants, and I am borne out in that opinion by the expression used by the witness Eastman, who said, "The sale was not by sample." What sale? He was clearly alluding to the order, because he had been referring to that just previously to using that expression. Further, he said, "I sold the matchboxes as per sample produced." I have referred to that in answer to the contention of Mr. Barker, that the plaintiffs were really agents for the defendants in the purchase of these articles. I am of opinion that they were not, but that there was a sale by them to the defendants and that the contract for that sale is evidenced by the writing to which I have referred. Now, before the Magistrate, the counsel for the defendants contended that the order for these knives was an incomplete contract, that neither the quality, material, nor kind was stated in the order, and that therefore parol evidence could be given to shew that the order *per se* was no contract, but only evidence of some part of the transaction, and therefore other evidence could be given to supply the omission. The Magistrate decided against the defendants and refused to allow them to give any evidence with regard to what took place before the order was signed. I think the Magistrate was right. There is no latent ambiguity in the order; it is for a certain number of advertising penknives bearing the defendants' advertisement on both sides. Such a knife was produced before the Magistrate, and it has been produced before us here. Upon examining that knife it is clear that it is an advertising penknife and that it does bear the advertisement of the defendants on both sides. That being so, I do not

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think it is competent for the defendants to give any evidence to the effect that a particular kind of knife was ordered and that the knife supplied does not answer that particular description. Several cases have been relied upon by Mr. Durstan in the course of his argument, but I do not think the circumstances of these cases are applicable to this particular case before us, because the document relied upon by the plaintiffs is so clear in expressing what they agreed to supply. I think it was incumbent upon the defendants if they required penknives of a particular class, to have expressed what they wanted in the contract. True, under the Sale of Goods Act the plaintiffs are not allowed to foist upon the defendants any articles they choose to call a penknife; the article must, I think, be one of some value, or to use the expression contained in the Act, it must be of merchantable value, and the only evidence that the defendants were entitled to adduce before the Magistrate was evidence to prove that the knife produced had no merchantable value. No attempt was made to do that, the only effort being in the direction of proving the quality of the handle of the knife. Now, although the handle of a knife may not be of excellent quality, still that does not go so far as to say that the knife itself is not of merchantable value; nor does it go to shew that it is not an advertising penknife. I think all the Magistrate had to be satisfied of was that the knife came within the description given of it in the contract for the sale and purchase; and so long as he was satisfied upon that point the defendants were not entitled to give evidence that the penknife they ordered was a knife of a different kind to that expressed in the document itself.

HENSMAN, J. I agree in the main with what has just been said by the learned Chief Justice, but I desire to put my views shortly before the Court. I am sorry that I am unable to see my way to assist the defendants in this case, because I think, upon the evidence, it is clear that they thought they were getting a penknife as described in the slip shewn to them, and it may be that these knives do not correspond with the picture which represents them. To my mind the picture on the slip represents the knives to be of white material answering to the white crystaloid specimen match-box. Therefore, I should have been glad to see my way to come to a different conclusion in this matter and to have allowed the case to be re-tried with the evidence tendered admitted. It is

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somewhat curious that the evidence of the plaintifts as to shewing them the catalogues was admitted, but when it came to the witnesses for the defendants being called, I think the Magistrate was right in refusing to admit evidence of the conversation which led up to the signing of the order further than to shew just the broad circumstances under which the order was given. The question is whether the Magistrate was right in rejecting the evidence as to what material the handle of the knives consists. Upon that point I am of opinion that there was no express warranty, that is to say, that if the defendants wished to make the representations on the catalogue part of the contract, they should have referred to it in the document. I sympathise with them to a certain extent, but we must administer the law, although in a somewhat exceptional case. The law is clear that where a document sets out a contract, and appears to express the whole of the contract, and there is nothing that requires explanation, evidence of any conversation before or after the making of the contract cannot be admitted. The next point is, was there an implied warranty. I agree with what the Chief Justice has said, that all that was required by law of the plaintiffs was that the goods should be of merchantable quality. I think here there was an implied warranty that the goods should be of merchantable quality, that is to say, that although the exact quality of the knife could not be inferred, still, it must be a fairly good article, worth somewhere about the price paid for it, and it must not be a toy knife or a knife which would break the first time you used it. Now the objection taken by the defendants for refusing these knives was not that they were not merchantable, or that they were not advertising penknives, but it was that they were of inferior quality to those ordered. There can be little doubt that when the defendants gave the order they had in their mind that they wished a penknife such as was described in the catalogue of the American firm. They do not take the objection that the knife was not a merchantable article, and therefore, I think the Magistrate was right when he refused to hear evidence on that point. I think the Magistrate was right so far, and I do not think that even if we sent the case back the defendants would be able to prove that the knives were not merchantable. The Magistrate was there sitting as Judge and jury, and we are now occupying that position. I have tried this knife and I find it is a penknife, and that it will cut, and I think we

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should be wasting the public time and the money of the appellant if we were to send the case back to the Magistrate. In my opinion the appeal should be dismissed.

MOORHEAD, J. I am of the same opinion. I find here that there was a contract for sale, and I find an absence of any description whatever which would guide us as to the evidence which was sought to be adduced in the Court below. When the defendants refused to accept delivery of these knives they said "We return you knives, they are of a very poor class and not the class we ordered, we therefore cannot accept same." It has been pointed out by my brother Hensman that there is a complete absence in the contract of any reference to any other document which would guide us. The contract merely says "Please procure us 250 advertising penknives bearing our advertisement on both sides." The document is silent as to the class of knife, and it is also silent as to the material of which the handles were to be made, and so far as I can see it is impossible to read into that the slips or cuttings descriptive of the particular article which are alleged to have been shewn, not that I think it would carry us very much further even if the substance used in the handles was mentioned, because taking the knife as described here it is described as crystaloid—it merely says that the substance in which the advertisement is laid is crystaloid. I think under the circumstances the Magistrate was right, and I agree that the evidence sought to be introduced here is really evidence to prove something which was not contained in the order given. I agree that we cannot go behind that order and accept evidence of conversations tending to vary that order.

Solicitors for appellant: *Speed & Durstan.*

Solicitors for respondent: *Barker & Boultbee.*

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July 31.

The C. J.
Hensman, J.
Moorhead, J.

DAVIES (DEFENDANT), APPELLANT.

WORTHINGTON AND ANOTHER (PLAINTIFFS), RESPONDENTS.

Legal Practitioners Act, 57 Vic., No. 12, 35—Bill of Costs—Counterclaim in Local Court.

A Solicitor is not entitled to claim the amount of his Bill of Costs as a counterclaim in an action against him in a Local Court without having first delivered to his client a signed bill under the provisions of the Law Practitioners Act, 1893, Section 35.

Appeal from the decision of the Local Court of Kookynie in an action against

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the appellant by the respondent for re-payment of monies alleged by them to have been paid to the respondent for a specific purpose which failed. In such action the appellant delivered a counterclaim for a bill of costs, no signed bill as required by Section 35 of the Legal Practitioners Act, 1893, having been delivered, and the Resident Magistrate dismissed the counterclaim, holding that the requirements of Section 35 of the Legal Practitioners Act, 1893, must be complied with to entitle the appellant to counterclaim.

The grounds of appeal *inter alia* were: That it was not necessary to deliver a signed bill of costs to entitle the defendant to counterclaim; that if such signed bill was necessary then the signed counterclaim was a signed bill within the meaning of Section 35 of the Legal Practitioners Act, 1893.

W. M. Purkiss, for appellant.

A. D. Stone, for respondents, was not called on.

STONE, C.J. I am unable to agree with the contention of the appellant that it is unnecessary for him to deliver a signed bill of costs before counterclaiming for the same in an action that may be brought against him, nor do I agree that the signed counterclaim is equivalent to a signed bill of costs. Section 35 of the Legal Practitioners Act, 1893, says that no practitioner . . . . shall sue for the recovery of any services, fee, ... until a bill of the same signed. by such practitioner shall have been delivered to the party charged. Now a counterclaim is an independent action in which the practitioner sues—and it is a condition precedent to his right to sue that he should have delivered his signed bill of costs. To hold otherwise would defeat the object of the Act which is to enable the party charged to have the bill taxed in the method pointed out by the Act and without action thereon if he so desire. The appeal must be dismissed.

HENSMAN, J. I concur.

MOORHEAD, J. I concur.

Appeal dismissed with costs.

Solicitors for appellant: *Haynes & Purkiss* (for *A. J. Davies*, Kookynie).

Solicitor for respondents: *R. D. Beresford* (for *M. A. Acraman*, Kookynie).

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1902.

August 6.

The C.J.
Hensman, J.
Parker, J.

F. E. WILSON (DEFENDANT), APPELLANT.

C. H. C. NEWLAND (INFORMANT), RESPONDENT.

Hawkers and pedlars—55 Vic. No. 35—Other person—Sec. 6, exception "any victuals" —Tea

A person selling tea from house to house is not a hawker or pedlar within the meaning of the Act 55 Vic., No. 35. *Spark* v. *Mooney* (*a*). Approved tea is a "victual" within the meaning of the exceptions in Sub-section 2 of Section 6 of the before mentioned Act.

Case stated by the Resident Magistrate, Northam, pursuant to the Statute 23 Vic., No. 3.

Wilson was fined £3 and 4s. 6d. costs in default fourteen days, under 55 Vic., No. 35 for unlawfully hawking tea.

Barsden, for the appellant, contended that the appellant was not hawking within the meaning of the Act. *Spark* v. *Mooney*. Tea is a victual. *Rex* v. *Hodgkinson* (*b*), *Rex* v. *Waddington* (*c*).

STONE, C.J. I think with regard to the first point raised in the case as to whether the defendant comes within the definition of a hawker, as mentioned in 55 Vic., No. 35, that this case is governed by the opinion of the Full Court in *Spark* v. *Mooney* decided in 1900, and reported in the W. A. Law Reports. It must be clear from the definition the Court laid down in that case as to what constituted a hawker, that the Magistrate was wrong in his finding on that point. With regard to the second point that the defendant was charged with taking orders for tea, it was claimed that tea came within the exceptions included in the 6th Section of the Act, which excepts sellers of vegetables, fish, fruit, newspapers, matches, game, poultry, butter, eggs, milk or any victuals. I think, clearly, that tea comes within the meaning of these words "any victuals," and that the Magistrate was wrong in coming to the conclusion that victuals meant articles not *ejusdem generis* with fish, newspapers, etc. On that point he came to an erroneous conclusion, and the conviction of the Magistrate should therefore be reversed.

HENSMAN, J. I am of the same opinion, and I desire to repeat what I said in the previous case of *Spark* v. *Mooney*. I am of opinion that it was not proved that this man was a hawker within the meaning of the Act. With regard to the second point, I am of

(*a*) 2 W.A.L.R., 154. (*b*) 10 B. & C., 74. (*c*) 6 R.R., 238.

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opinion that victuals include tea. The only point that caused me consideration was whether, as the Magistrate thought, the Section meant victuals of a perishable nature. But I see brooms, newspapers, and matches are excepted, and it also says "any victuals," so I am therefore of opinion that, putting a fair construction on that Act, it certainly includes tea.

PARKER, J. I fully concur in the opinion expressed by the Chief Justice and Mr. Justice Hensman that tea is included in the term "any victuals." The Magistrate came to the conclusion that it was not included because he said victuals in the Act meant something which was *ejusdem generis* with butter, eggs, milk, etc That might have been the case did not some other words appear which shew clearly that "victuals" could not be meant to be limited to goods *ejusdem generis* with those mentioned by him, newspapers, brooms, etc., being also set down. Therefore, in my view "victuals" include tea. I will not say anything on the other point as to whether the appellant was a hawker or not, because I have not considered the question. The other learned Judges have previously considered the matter and formed their views upon it. I will content myself, therefore, with resting my judgment on the opinion that tea is a victual.

Appeal allowed with costs.

Solicitors for appellant: *Moss & Barsden.*

WILLIAMS, PLAINTIFF (RESPONDENT).

SOUTH BRITISH INSURANCE COMPANY OF NEW ZEALAND, DEFENDANT (APPELLANT).

1902.

August 8.

The C.J.
Hensman, J.
Parker, J.

Appeal—New trial—Notice—Order 37, *rule* 3—*Order* 54.

Judgment was given on the findings of the jury on the 9th May, and a stay of proceedings granted on the terms that the appeal should be set down for the first day of the next sitting, viz., the 20th May. The appellant served both the notice of motion for new trial and for appeal on the 14th May, *i e.*, in less time than required by the Rules.

Held, that under the special circumstances the Court would enlarge the time for defendant to give notice of motion for a new trial and for an appeal.

Haynes, for respondent, raised the preliminary objection that the motion for new trial could not be heard as the respondent had only received a five days' notice: Order 37, Rule 3 required an eight day notice. The same objection applied to the motion for

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appeal: Order 54, Rule 3 required a 14 days' notice, whereas the respondent had only given a five days' notice.

James, K.C., for appellant. There are special circumstances why the Court should exercise its discretion and allow a short notice. On the 9th May, when Judgment was delivered, a stay of proceedings was granted on condition that the appeal should be entered for the next sitting of the Full Court, the 20th May. It was, therefore, impossible to give a fourteen days' notice of appeal for the next sitting.

Haynes, in reply. That was a condition for a stay of proceedings only. It might affect the appeal, but could not affect the notice of motion for a new trial. The appellant had ample time after the 9th to have given the required eight days' notice.

STONE, C.J. I think sufficient ground has been shewn for the exercise of the indulgence asked for by the Attorney-General in this case. On many previous occasions I have expressed an opinion in favor of the strict observance of our Rules, and my desires have always been to try and get the members of the profession to observe as closely as they can those Rules; but there are cases in which I think the Court should exercise the power it possesses in allowing certain amendments to be made or certain enlargements of time permitted. But for the circumstances to which the Attorney General has drawn the attention of the Court, I should have been entirely with Mr. Haynes. It appears, in this case, that at the instance of the respondent, the appellant was put upon terms with regard to appealing, those terms being that he should appeal at the May sittings of the Court. Now, at the time he was placed upon those terms he was not in a position to strictly comply with the Rule which required a 14 days' notice of appeal to be given. It is true that he was within time to give notice for a new trial, but I do not think we should be so strict as to draw that distinction. There is no doubt that at the time these terms were imposed it was desired by the respondent that whatever points the appellant took against the plaintiffs, judgment should be brought on and decided as early as possible, namely, at the May sittings. These terms were imposed upon the 9th May and the sittings commenced on the 20th May, so that, even taking the terms as they stand, without any reference, and dealing with them literally, the appellant could not have complied with the terms imposed upon

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him, because he would not have been able to comply with the Rule. Under these circumstances I think special grounds are shewn for enlarging the time for the defendant to give his notices for a new trial, and also for an appeal.

HENSMAN, J. I am of the same opinion. Perhaps I have not always taken exactly the same view of these Rules as the Chief Justice, because my view has always been that, where justice requires, we should, if we can lawfully do so, give latitude to parties. I think that the Rule should be our servant and not our master, and although it is most desirable that things should be done in order, still, it is undesirable that parties should suffer through some mistake, perhaps in the lawyer's office. I think the due observance of the Rules may be enforced by imposing a penalty in costs, and by exercising that right very freely in instances where non-observance of the Rule has been clearly brought before us. In the present case I certainly think we ought to act upon our discretion and enlarge the time.

PARKER, J. I concur.

Solicitors for appellant: *Speed & Durstan.*

Solicitor for respondent: *A. F. Abbott.*

SAVAGE (DEFENDANT), APPELLANT.

HUNGERFORD (RESPONDENT.)

1902.

August 8.

Moorhead, J.

Wine, Beer and Spirits Sale Act, 1879, Sec. 69—Posting suspected seller of spirits without license—Conviction—Quashing.

A conviction stated that the defendant "did unlawfully have in his possession a certain quantity of spirituous liquor after having been posted as a suspected sly grog seller contrary to Section 69, &c."

This was an appeal to the Criminal Sessions, Perth, against a conviction of the appellant by the Resident Magistrate of Busselton.

The facts were as follow:—The appellant kept a small store in the Sussex district near the Jarrahwood Timber Company's Station. He held a carrier's license and was in the habit of visiting the mill during the week to deliver the goods previously ordered by the men working there. A public road ran through the Station. On the 15th June, 1902, he passed through the Timber Station in his cart with four bottles of whisky, groceries, etc., which he was taking to his customers. A police constable in plain clothes stopped him, informed him who he was, and stated that the appellant was posted up as suspected of sly grog selling. The constable searched the cart, found the four bottles of whisky, and then arrested appellant and took him and his horse and cart into Busselton, where he laid the following charge in the Charge Book, viz.; "That you did at Jarrahwood Timber Station . . . . unlawfully have in your possession a certain quantity of spirituous liquour after having been posted as a sly grog seller."

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Held, That the conviction must be quashed as it disclosed no offence within the meaning of Sec. 69 of 44 Vic., No. 9.

Money, for appellant.

MOORHEAD, J. I do not think it necessary to go into all the points raised on the notice of appeal. In my opinion the conviction discloses no offence within the meaning of Section 69 of the Act, and therefore must be quashed.

Solicitors for appellant: *Stanley, Money & Walker.*

Solicitor for respondent: *Crown Solicitor.*

1902.

August 15.

The C. J.
Hensman, J.
Parker, J.

A. O'LEARY (PLAINTIFF).

COMMISSIONER OF RAILWAYS (DEFENDANT).

Negligence—Liability—Government railways—Injury to passengers—Contributory negligence of plaintiff—Supreme Court Rules, Order 38, *Rule* 10—*Power of Court to enter judgment instead of granting new trial—Evidence and weight of evidence.*

This action was tried at Kalgoorlie before Stone, C.J., and a jury of six (the facts appear in the judgment). At the close of plaintiff's case defendant's counsel moved for a non-suit but same was refused, leave, however, was reserved. Three questions were put to and answered by the jury, viz.: (1) Was the defendant guilty of negligence? Answer, "Yes." (2) Was the plaintiff guilty of negligence? Answer, "No." Damages, £1,000. The defendant appealed, and also moved for a new trial.

The W.A. Government Railways between Kalgoorlie and Kamballi used carriages on the American car system, with platforms at each end. The platform is enclosed by an iron railing, with gates on either side through which passengers enter and alight. There are notices on the carriage doors, viz.:—"Passengers are requested not to ride on the platforms." This notice had been continually disregarded by the public, and the officials had not interfered to enforce the observance of it. The evidence shewed that the plaintiff boarded the train at Kamballi and stood on the platform, and when he did so both gates were open. The train started and both gates remained open, and a few minutes after the train started it gave a jolt at a curve and the plaintiff was thrown through one of the open gates.

Held (by the Chief Justice and Parker, J.; Hensman, J., dissenting), that the plaintiff was in a position to see, or ought to have seen, that both gates were open, and that being so he should, if he elected to remain on the platform, have used extra precaution to ensure his own safety, and that not having done so he was guilty of contributory negligence which was the direct cause of the accident.

Held, also (by the Chief Justice and Parker, J.; Hensman, J., dissenting), that as all the facts were before the Court, and the Court being of opinion that it had before it all the materials necessary for finally determining the questions in dispute, it (the Court), under Order 38, Rule 10, had power to enter judgment for the defendant, and that as the Court were of opinion that the jury could not reasonably come to the conclusion they did in answering in the negative the questions whether or not the plaintiff was guilty of contributory negligence, judgment would be entered for the defendant. *Whitchurch* v. *Commissioner of Railways* (*a*), distinguished.

Pilkington, for appellant. Under Order 38, Rule 10, I propose to ask the Court if they shall be of opinion that a non-suit ought to

(*a*) 4 W.A.L.R., 53.

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have been granted at the trial, or if the Court is satisfied that the findings and judgment cannot stand (and the Court has before it all the materials necessary for finally determining the questions in dispute) to order judgment to be entered for defendant and not to order a new trial. Cases cited: *Hamilton* v. *Johnson* (*a*), *Waddell* v. *Blockey* (*b*).

Villeneuve Smith, for respondent, objected. The Court in such a case as the present cannot make the order asked, the most they can do will be to order a new trial under Rule 10, Order 38. The Court may draw all inferences of fact not inconsistent with the finding of the jury. The jury, who are the sole judges of fact, have found that there was no contributory negligence, and there was evidence to go to the jury. The Court said they would consider the effect of above Rule after hearing the arguments on the appeal. Cases cited: *Ogilive* v. *W.A. Mortgage and Agency Corporation* (*c*), *Brewster* v. *Durrand* (*d*), *Milissich* v. *Lloyds* (*e*).

Pilkington then argued that on the plaintiff's own shewing he was guilty of negligence. He (plaintiff) stood on a platform with both gates open. He had travelled on the line for two years and knew that the train jolted at that particular place; he could see, or ought to have seen, that both gates were open. His own carelessness was the cause of the accident. None of the officials saw him after the train started, the defendant could not, therefore, notwithstanding the plaintiff's negligence, have avoided the accident—that is, the defendant's servants could not take any precaution to avoid the effect of the plaintiff's negligence. In *Whitchurch* v. *The Commissioner of Railways* the guard was on the platform and saw the plaintiff come on to it, and he (the guard) did not close the gate. The plaintiff in that case had only just come to the platform, and the guard had time to close the gates. He neglected to do so and Whitchurch was thrown out, and in that case the jury found Whitchurch was negligent in going on the platform, but the defendant could have avoided the result, that is the guard could have closed the gate. All these circumstances are absent in the present case.

Smith. This case is in all respects on all-fours with

(*a*) 5 Q.B.D., 263.
(*b*) 10 C.D., 416.
(*c*) (1896) A.C., 257.
(*d*) W.N. (80), 27.
(*e*) 36 L.T., 423.

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Whitchurch's case. A guard in the present case saw plaintiff on the platform before the train started. The guard also saw both gates open—he must have known O'Leary would remain on the platform; he could easily have closed the gates; he did not; there was, therefore, evidence to go to the jury, at any rate, to warrant a finding that even if plaintiff was negligent in standing on the platform, the defendant's servant could, by taking ordinary precaution, *i.e.*, closing the gate when he saw O'Leary there, and have avoided the result of O'Leary's negligence. In addition there was evidence both ways, and it is entirely a question for the jury. It is not necessarily negligent for a passenger to ride on the platform of a train (Bevan, page 1200). The amount of danger, and the circumstances which led plaintiff to incur it are for the jury, *Clayards* v. *Dethick*, *(a)*. The mere knowledge of danger does not constitute contributory negligence, it must be shewn that the plaintiff had used that which was dangerous in a negligent manner, *Weblin* v. *Ballard*, *(b)*. A man is not necessarily negligent if he has contributed to his own injury by acting in a manner *prima facie* dangerous if there is evidence of acts of commission or omission by which he might be put off his guard, *Slattery* v. *Dublin, Wicklow and Wexford Railway Co.* (*c*), *Smith* v. *S.E. Railway Co.*, (*d*). The jury might reasonably infer from the whole evidence that the platform was made for the express purpose of being used by passengers, *Slattery* v. *Dublin, Wicklow and Wexford Railway Co.* at p. 1190, *N.E. Railway Co.* v. *Wanless*, (*e*). It was the practice for passengers to use the platforms, and the plaintiff knew the practice, and had travelled, without objection being raised, on these platforms for two years. He might reasonably suppose he could stand thus with safety, *Smith* v. *S.E. Railway Co.* at p. 186, Lopes, L.J., and see also at p. 188 judgment of Kay, L.J., *Rogers* v. *Rhymney Railway Co.*, (*f*). It is, therefore, wholly a question for the jury, *Brown* v. *G.W. Railway*, (*g*). As to the verdict being against weight of evidence, it is well settled that a new trial ought not to be granted on this ground unless the verdict was one which a jury, viewing the whole of the evidence, could not reasonably find; again, where there is evidence on both sides properly submitted, the verdict of a jury once found ought to stand, *Met. Railway Com-*

(*a*) 12 Q.B., 439.
(*b*) 17 Q.B.D., 122.
(*c*) 3 App. Cases, 1155.
(*d*) (1896), 1 Q.B., 178.
(*e*) 7 E. and Ir. App., 12.
(*f*) 26 L.T.R., 879.
(*g*) 52 L.T., 622.

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pany v. *Wright*, (*a*), *Phillips* v. *Martin*, (*b*), *Commissioner of Railways* v. *Brown*, (*c*), *Hampson* v. *Guy*, (*d*).

STONE, C.J. This was an appeal and an application for a new trial upon the ground that the verdict was perverse, unreasonable, and against the weight of evidence, and contrary to the direction of the learned Judge, and that the damages were excessive. The principal point relied upon by the appellant was that the verdict was against the weight of evidence, and the learned counsel for the appellant asked the Court to exercise the powers that it possesses under Rule 10 of Order 38, and, instead of granting a new trial, if the Court should be of opinion that the verdict of the jury was against the weight of evidence, to enter judgment under that Rule for the defendant. The point that the damages were excessive was not pressed, and, therefore, there is no occasion for me to deal with that point at all. Before deciding the question, which was argued at some length, as to whether this Court has power to enter up a judgment instead of granting a new trial, I propose to deal with that aspect of the question which refers to the point of whether the verdict was against the weight of evidence. The appellant, in making this motion, relied principally, if not altogether, upon the case made by the plaintiff by his own evidence and that of his witnesses; in effect contending that the defendant, upon that evidence, was entitled to have judgment by way of non-suit entered against the plaintiff. The case was tried before me at the Circuit Court, and an application made at the conclusion of the plaintiff's evidence for judgment, but I declined at that stage to end the case, and required it to go to the jury. The jury, after hearing the evidence of the plaintiff and the defendant, found that the defendant had been guilty of negligence, and that the plaintiff had not been guilty of contributory negligence. The negligence complained of was that the gates of a certain platform upon a train which the plaintiff travelled in had been left open, in consequence of which, owing to the jolting of the train in crossing certain points, the plaintiff was thrown out and received very severe injuries. These carriages have a platform in front and behind, which forms part of the carriage, but which is only placed there for the purpose of providing entrance and exit to and from the carriages, the carriages having no side doors, but only doors at each end opening on to these

(*a*) 11 App. Cases, 152.
(*b*) 15 App. Cases, 193.
(*c*) 13 App. Cases, 133.
(*d*) 64 L.T., 778.

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platforms for ingress and egress. It appears from the evidence of the plaintiff and his witnesses that the plaintiff and others had been allowed to travel on these platforms, although there was a notice posted up in a conspicuous place warning passengers against standing on these platforms. It would appear, however, that the plaintiff had not seen those notices before the accident, and that, notwithstanding those notices, passengers had, from time to time, been allowed to stand upon those platforms when travelling along the line. The gates of these platforms, it would appear, were more frequently left open than shut, because, at the time of the accident, there appear to have been no station platforms and no strict regulations that intending passengers should only enter the carriage from one side of the train instead of from either side of the train. The plaintiff was well aware that these gates to the platform were often left open, indeed more often open than shut; but he had travelled upon these platforms before without accident, and, apparently, became a little careless with regard to the position that he occupied upon them, and, therefore, did not take any steps to protect himself while standing upon these platforms. At the particular time when the accident occurred there was no occasion for the plaintiff to stand upon this platform, because there was plenty of room for him in the carriage, which was a safe place for him to occupy, and the place provided for passengers to occupy when travelling on the line. It appears that he wanted to have a smoke, and so he preferred to go upon this platform, where he stood so close to the gate that he must have known, or ought to have known, that the gate was open; he also ought to have known, from his having constantly travelled upon this line, that the train would cross certain points not far from the station, and where it was in the habit of jolting. He admitted himself that the train usually jolted when crossing these points; but, notwithstanding this, he did not appear to think it necessary to protect himself when standing upon the platform by holding on to anything, although he knew that the train always jolted when crossing these points. Now, it was urged that although the defendant might have been guilty of negligence in leaving these gates open, the plaintiff was also guilty of contributory negligence by going and standing upon that platform with open gates when there was no occasion for him to do so, there being plenty of room in the carriage. The defendant says also, that, although the plaintiff was not unlawfully upon this platform,

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because he had been allowed to occupy that position so frequently before without interference by the Railway authorities, still there was a duty cast upon him to protect himself from the danger that was apparent to any reasonable man standing at the spot where the plaintiff was standing, and knowing that the train jolted when crossing the points. The only doubt I had in my mind with regard to the question raised upon this appeal was whether, in the face of the finding of the jury, which is not challenged, that the defendant was guilty of negligence, this Court could grant a new trial, and take away, in effect, the case from the jury who had not found contributory negligence, upon the ground that they ought so to have found. And the doubt that I had was raised by the various cases which were cited by counsel for the plaintiff in the course of the argument. I have had an opportunity since of reading a case decided in the Irish Court, where most of those cases relied upon by Mr. Smith, counsel for the plaintiff, were very fully reviewed and a decision given, which seems to conclude the question upon this point of whether the Court can, where there is negligence, and the jury have found that there was no contributory negligence, take the case away from the jury. The case I referred to is, *Coyle* v. *The Great Northern Railway Co. of Ireland* (*a*). The case was one in which an accident occurred on the railway to a railway workman, who was employed upon the line, and who, in the course of his duty, had to walk across the line to procure his tools, which were kept on the other side of the railway line. He was re-crossing on the morning of the accident at a time when it was usual for certain shunting to be done. The trucks passed over him and he was killed, and action brought by his representatives against the Company for negligence. The plea of contributory negligence was set up, and the Judge left the case to the jury. Further on, an application for a new trial was made, on the ground that the Judge ought, on the evidence of the plaintiff and his witnesses, to have taken the case from the jury. The Court held that he ought to have so done, and that he ought to have entered judgment for the defendant, because the undisputed facts shewed that the plaintiff acted negligently, and that his negligence was the sole cause of the accident. In that case, Palles, C.B., in the course of his judgment, went fully into the cases, most of which have been cited in the course of the argument before

(*a*) 20 L.R., Ireland, 409.

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this Court. He referred particularly to the case of *Slattery* v. *The Dublin, Wicklow and Wexford Railways* (*a*). In the course of his judgment he says :—" The case, therefore, appears to me to reduce itself to this: Can a person either knowing or not knowing the usage by which a railway is worked at a particular place, and who has, before he attempts to cross the line, full opportunity of seeing an approaching train, the running of which is not proved to be, either in time, rate of speed, or otherwise, contrary to the ordinary usage, and when that person crosses the line either without looking for the train, or with the knowledge of its approach, and is thereby injured, attribute the injury to the act of the Company? Or, in other words, can we say that the relation of cause and effects, in the sense of *causa causans* and direct effect, exists between them? In my opinion we cannot. If he actually looks and sees the coming train, and crosses with full knowledge of its approach, he does so at his own risk. This proposition appears to me to be so clear as not to require any decision to support it: but it has the high authority of Lord Cairns, Lord Coleridge, Lord Justice Bagally, and Lord Justice Bowen. On the other hand, if he is ignorant when, under the circumstances as existed between him and the Company, he ought to have known that the train was approaching, his legal position does not appear to me to differ from that which it would have been if he had actually known what, by using due care he would have known. To hold otherwise would be to enable a person to take advantage of his own wrong." The learned Baron later in his judgment, said :—" As the accident could not have happened unless the plaintiff were, at that particular moment, on that portion of the line, his negligence in being there is at least a *causa sine qua non* of his death. Whether it was the *causa causans* depends on this. Was there neglect on the part of the defendants of anything whereby the consequence of the plaintiff's negligence might have been prevented? Assuming that it was not clear that the negligence of the deceased was the sole cause of the accident, it was at least a contributing cause, and if that were its character the first question is the abstract one—can the case be withdrawn from the jury? There is one very high authority that it cannot." The learned Baron then referred to the opinion of Lord Penzance in *Slattery* v. *The Dublin, Wicklow and Wexford Company*, against which he cited the opinion of many other learned Judges. He then continues :—

(*a*) 3 App. Cases, 1155-1173.

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"I have also the opinion of Lord Justice Bowen, in the case of *Davey* v. *The London and South Western Railway Co.* (*a*), and of Lords Watson and Fitzgerald in the case of *Wakelin* v. *The London and South Western Railway* (*b*), and with that mass of judicial authority against the view of Lord Penzance, I have not been able to find one single case or even a solitary dictum to support it. His judgment, in my view, is in all other respects a most able and valuable one; but upon the first abstract question—that no matter how clear the relation of cause and effect may be between the plaintiff's negligence and the injuries complained of, the question of contributory negligence cannot be withdrawn from the jury—I am wholly unable to follow him. There is no doubt the jury can find the facts of contributory negligence. Why cannot the admission of the party of that supply the finding of the jury? Why cannot the evidence of a witness put forward by the plaintiff, whose testimony the plaintiff asks the jury to hold to be true, if it proves that fact, supply the place of an admission or finding." The learned Judge then lays down that he thinks the following proposition is established by all the authorities. I will quote his words:—"That to justify the Judge in leaving the case to the jury, notwithstanding the voluntary act of the injured person, which contributed to the injury complained of, the circumstances must be such as either, firstly, to make the question whether that act is negligent (either *per se*, or having regard to the fact of the defendants inducing or effecting it) a question of fact; secondly, the circumstances must be such as to render reasonable an inference of fact, that the defendant, by using due care, could have obviated the consequences of the plaintiff's negligence. If the case be so clear that the determination of these two questions involves no inference of fact, it is for the Judge and not for the jury." Now it is upon that principal that I have come to the conclusion that this Court has power, notwithstanding a verdict of negligence has been returned against the defendant, to take the case away from the jury if this Court considers that they have not reasonably come to the conclusion upon the evidence of the plaintiff and his witnesses that he was not guilty of contributory negligence. But I think, also, that in coming to this conclusion, I must be decided by the decision of this Court in the case of *Whitchurch* v. *The Commissioner of Railways* (*c*), because

(*a*) 12 Q.B.D., 70-75. (*b*) 12 App. Cases, 41.
(*c*) 4 W.A.L.R., 53.

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the facts of the present case are almost identical with the facts in that case. It is true, in my judgment in that case, I referred to the particular position in which the plaintiff was upon the occasion when he was thrown out, viz., stooping down, but I do not think that that sufficiently distinguishes the present case, where the plaintiff was only standing up. I think there was a duty cast upon the plaintiff when he was standing upon that platform, close to the open gate, and with the knowledge that shortly after leaving the station the train crossed these points and jolted, to protect himself by holding on to something. I am of this opinion for the same reason as I was of opinion in Whitchurch's case that there was a duty cast upon the plaintiff, when stooping down, to hold on to something to protect himself. I think there is a similar duty cast upon persons under like circumstances using these platforms as is cast upon a person using a crossing of a railway where there is one safe crossing guarded by watchers, and another crossing unguarded and dangerous, but which the railway authorities have allowed passengers or the public from time to time to use. True, they are lawfully crossing at that place, but there is a duty notwithstanding cast upon them to look and see that there is no approaching train at the time they are crossing. They are not misled by being allowed to cross there, nothing has been done to lead them to believe that there is no train about to pass while they are crossing, and therefore there is a duty cast upon them to look out for a train when they are about to cross. In the same sense the plaintiff in this case was not misled by the railway authorities to believe that because he had been allowed to stand on the platform with the gates open, that he was allowed to stand there without protecting himself in any way, or without holding on to something. I think it was his clear duty, notwithstanding that he had the implied permission of the railway authorities to stand in that position, to have protected himself when standing in that dangerous place. He could not, as a reasonable man, have come to the conclusion that that was a safe place to stand upon, knowing as he did that the gates were open and the train was in the habit of jolting when going over these points. I am further of opinion that the jury could not reasonably have come to the conclusion, upon the evidence of the plaintiff and his witnesses, that he was not guilty of contributory negligence. If I was further of opinion that this Court could not [illegible] judgment, I should have been in favor of a new trial. I am,

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however, clearly of opinion that as this Court has all material facts before them necessary to come to a conclusion upon this case, we are at liberty to enter judgment. I think the cases quoted by Mr. Pilkington on this point have a strong bearing upon this question. It is clear from those cases that the Courts can, under such circumstances, enter judgment instead of granting a new trial, because the only object in granting a new trial is that additional light might be thrown upon the case. Where, however, the Court finds upon the evidence of a plaintiff and his witnesses alone that the jury could not reasonably come to the conclusion they did, there can be no object in sending the case back for trial, because if we did it would only encourage the plaintiff to tell a different story to that told upon the first trial. For these reasons I am of opinion that judgment should be entered for the defendant.

HENSMAN, J. In this case it appears for years past the carriages upon this line of railway have been constructed with platforms at each end with gates that could be opened and shut, and it appears that, although there were doors within the carriage, the doors were always left open, so that, in point of fact, the whole of the coach formed part of the carriage upon which passengers travelled. It appears that the guards have been in the habit of collecting money from persons travelling on these platforms. It is true that there is evidence that there was some notice put up on the door, still the fact remains that for years past passengers have been in the habit of travelling with the knowledge and consent of the railway authorities on these platforms without objection. On the present occasion, when the plaintiff met with his injuries, he was thrown out of gates which were certainly not locked, probably not even closed. I think, therefore, that the jury were quite right in finding that the defendant was guilty of negligence. The important question, however, was: Did the plaintiff contribute wholly or partially to the accident by his own negligence? That appears to me to have been entirely a question of facts for the jury; the burden of proof that the plaintiff was guilty of negligence, in other words, that he did not use that platform in a proper manner, was upon the defendant, and I cannot see that it comes in any manner a question of law. I think that questions of alleged fraud and questions of negligence are peculiar matters of fact which have to be decided by the jury; the Judge will direct the jury as to the

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principals upon which they are to decide, but the jury must decide the facts upon their own judgment. It has been established that the plaintiff was lawfully upon the platform, and in this respect the decision of the Court in the case of *Rogers* v. *The Rhymney Railway Company* (*a*) is in point. In that case the Court decided that where the passengers had been in the habit of using a crossing habitually he was lawfully on the spot. In that case Kelly, C.B., said: "It was, in my opinion, properly left to the jury by the learned Judge, whether passengers had used this crossing habitually, and whether the deceased was lawfully on the spot where she met her death." Martin, B., agreed in the judgment, saying: "The question, as it seems to me, is whether the deceased was lawfully on the line, and the jury have found that she was. As to negligence, I think there was evidence of negligence in the fact that the fireman only and not the engine-driver was on the engine which knocked the deceased down, and that there was no guard at the end of the train to see that the line was clear before the train was shunted backwards. And though there was a notice board to warn passengers against crossing, yet there was a plain path across the rails which passengers, to the defendant's knowledge, and without any objection on their part, were in the habit of using." And Bramwell, B., concurred in the following words: "It appears to me that there was plenty of evidence that the deceased woman was lawfully crossing the rails. The defendants allowed her so to do. They might have prevented it. She was there with their license, and they had a duty I think, imposed upon them to take care of her. The defendants allowed this crossing to be used as a convenience for their passengers, and, if so, they must be taken to have held out to their passengers that they might use it with safety." In the present case the Railway Commissioner, for his own convenience, allowed the passengers to ride either inside the carriages or on the platforms. That being so the plaintiff was lawfully there. Indeed, it appears to me to be a question of fact whether under the circumstances of the case he used this platform in a negligent or improper manner. This case does not appear to me to be at all similar to the case of persons crossing railway lines where they have a right to cross, and where through negligence the train runs over them. There all they are allowed to do is to cross, but no one would suggest that by allowing them to cross they were relieved of

(*a*) 21 W.R., p. 21.

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the liability to look either way to see that the train does not run over them. It may be that where a person is crossing a railway in daytime and a train comes down on him, it may be so clear that it was owing to his negligence that he was injured. In such a case the Judge might direct the jury that the evidence was so strong on the question of contributory negligence that they must find that the plaintiff was guilty of contributory negligence. It appears to me, however, that if there are any facts for a jury to consider, those facts must be left with them, and they must decide upon them and not a Judge. A great many facts may be required to shew that a man standing upon a platform, as in this case, was standing there reasonably and looking after his own safety. That may depend upon the exact position of the gates, or upon the number of persons on the platform, or even upon the kind of persons who were there, but these matters do not appear to me to be questions of law. It is said in this case that this Court is bound by the decision in the case of *Whitchurch* v. *The Commissioner of Railways*. With regard to that case, it is to be borne in mind that there the Court was not asked to exercise the powers which the learned Chief Justice considers it has under the Orders of Court. The motion in Whitchurch's case was for a new trial, and the question which we had then to decide was whether the findings of the jury could stand, or whether they must be set aside and a new trial ordered. The facts were similar in that case to those before us now, but with this great difference, that the man, the moment he got on the platform, stooped down just as the train was passing some points. It is to be observed, in the judgment of the learned Chief Justice, he deals with that point, saying: "Therefore he went there freely, of his own accord, and not from necessity, and that being so, I think it could not for one moment be held that he acted as a wise and discreet man in going upon that platform and stooping down without protecting himself in some way by taking hold of something." That was the learned Judge's opinion as to whether the verdict upon that point of contributory negligence ought to be set aside or not. I have before me my own judgment in that case, reported briefly—I think it is reported too briefly, or I should have expressed myself a little more fully in order to make clear my meaning. I said there: "The plaintiff knew, or ought to have known as a reasonable man, that the gate was open, and he ought to have known that it would be unsafe to stand there." I think I meant that under the circumstances

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it was unsafe to do so. I could only have intended those observations to apply to the circumstances of the particular case in which the Chief Justice had so clearly expressed himself. I then said: "He went there, and therefore I am of opinion that the jury were wrong in their finding on that point." That is to say, I was of opinion, under the circumstances of that case, that the verdict of the jury could not be supported, because I say afterwards—and this shews my view of the definition of the law—"The rule of law is that where a matter is put fairly and fully before a jury the Court will not interfere with their findings." Those words again state briefly that where there is evidence upon both sides, or where it is open for the jury to decide, the Court will not disturb their findings. In Whitchurch's case I thought the jury were wrong in finding that the man was not guilty of contributory negligence, chiefly on account of the way in which he was standing upon the platform; but I cannot say there was any duty in law cast upon a man to lay hold of anything whilst in that situation. It may be that the Judge might well instruct the jury that there being something there which the man could lay hold of that they should consider he ought to have done so. That, however, deals only with the facts of the case, and contains no rule of law. There can be no rule of law that a man shall lay hold of anything at a particular time or stand in a certain position—that is a question of fact which the jury have to decide under all the circumstances of the case. It is said here that it is so clear that this man was acting unreasonably and negligently and that he brought on himself his own injuries, that the Court should at once decide to enter judgment for the defendant. One fact alone shews me that that ought not to be so. There is evidence that hundreds of people have been in the habit of travelling on these carriages in the same way as the plaintiff did. I take it that this was a fact that the jury would take into consideration, more especially a jury living near the spot, who would know all the circumstances and details connected with these carriages, and who would know in what manner they ought to protect themselves. They would be judges, and I think they would be far better able to say whether the man brought the accident upon himself by his own negligence or not. I am, therefore, of opinion that in this case it is not right for the Court to enter judgment for the defendants, and that at most they can only order a new trial. I am always very loath to interfere with the verdict of a jury, and I consider in this

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case and in cases of a like nature juries are better judges than the members of this Court. On the whole I doubt whether I should have been inclined even to grant a new trial, because I think these motions for new trial, wherever the parties have means of bringing on the case, are not to be encouraged. There should be some end to litigation, particularly in cases where the defendants are persons with means, because the other party may be debarred from justice by the want of means. I am clearly of opinion that judgment should not be entered for the defendant, because I think these are matters of fact, and not matters of law.

PARKER, J. I am of opinion that if the case is one in which the learned Judge should have directed the jury to find for the defendant, this Court should now enter judgment for him. In the case of *Slattery* v. *The Dublin Wicklow and Wexford Railway Co.*, Lord Hatherly, in dealing with a similar question, said: "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendant, I do not think there is anything left for the jury to decide, there being no contest of fact," and these words were quoted with approval by Lord Watson in the case of *Wakelin* v. *The London and South Western Railway Co.* (*a*). In Slattery's case Lord Coleridge expressed himself on this point in the following words: "It is, I think, the duty of the Judge to withdraw the case from the jury, if, by the plaintiff's own evidence, at the end of the plaintiff's case, or by the unanswered and undisputed evidence on both sides at the end of the whole case it is proved, either that there was no negligence of the defendants which caused the injury, or that there was negligence of the plaintiff which did." A similar opinion was given by Lord Fitzgerald in Wakelin's case. In the same case Lord Fitzgerald said: "Contributory negligence in such a case as the present seems to me to consist of the absence of that ordinary care which a sentient being ought reasonably to have taken for his own safety, and which, had it been exercised, would have enabled him to avoid the injury of which he complains; or the doing of some act which he ought not to have done, and but for which the calamity would not have occurred. I have used the words, 'ordinary care'; extraordinary caution is not required. This being the law we have to consider whether the plaintiff did exercise

(*a*) 12 App. Cases, 41, 48.

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that ordinary care which he ought to have taken for his own safety, and further, had he exercised it, would the injury of which he complains have been avoided ?" It is obvious that the platforms at either end of the railway carriages are there for the purposes of ingress to and egress from the carriage itself. The carriage has seats for passengers, and the proper place for passengers is upon those seats. No doubt it has been the custom for the railway officials to allow persons to remain upon the platforms whilst the train is in motion. The effect of that seems to me to be that they may be said to be there with the leave or license of the Commissioner of Railways; but, although persons may be lawfully or rightfully upon the platforms, still they are bound to exercise ordinary care and caution for their own safety. The plaintiff remained on the platform after the train started, although the carriage door was open, which fact I take to be an invitation to enter the carriage. I say this because it has been argued that the fact of the door being open was an invitation for a person in the carriage to go out upon the platform. From the evidence of himself and his witnesses we find that he knew the train was about to pass over certain points which would cause it to lurch or bump, or where some more than ordinary movement was expected. Notwithstanding this he apparently did not even look to see if the gates were closed, nor did he attempt to steady himself by holding on to the rail. He stood about the centre of the platform, between the door and the open gateway, and as the gauge of the line is only 3 feet 6 inches, and the door of the carriage is in the centre of the platform, it is obvious that the plaintiff stood not more than 2 feet from the edge or gateway of the platform. Had he taken the most cursory glance at the gateway he must have seen that the gate was open. He, however, told us that he did not know whether it was open or closed, although there was no one between him and the gate, and nothing to obstruct his view. He could have ascertained by simply looking that he was in a dangerous position; and there was nothing to prevent his shutting the gate. Such being the admitted facts, in my opinion, the plaintiff did not exercise that ordinary care which he ought to have taken for his own safety. We are told that many people travelled on the platform from time to time; but we are also told that when the carriages were crowded these gates were sometimes shut. It may be that when these platforms were crowded passengers took care to shut the gates. In Slattery's case the negligence complained of was that the train which ought to have

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whistled did not whistle. Slattery crossed the usual place for passengers, and he was, therefore, lawfully upon the line; still, Lord Cairns says, in his judgment: "If a railway train which ought to whistle when passing through a station, were to pass through without whistling, and a man were in broad daylight, and without anything in the structure of the line or otherwise to obstruct his view, to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man and not the carelessness of the Company which caused his death." In the case before us can it be said that the fact of the gate being open was the sole cause of the accident? It was broad daylight, and the plaintiff might have avoided the negligence of the defendant by closing the gate, by taking hold of the rail, or by going into the carriage and seating himself in a place of safety. Was not his injury caused by his own folly and recklessness and not by the negligence of the defendant? Then it is said that the Commissioner of Railways held out these platforms as safe by allowing persons to travel on them. He may have held out that the platforms were safe with the gates closed, but certainly not with the gates open. The plaintiff charges the defendant with negligence because they were not closed. He knew that the gates ought not to be open, and that it was dangerous to leave them open, and consequently, whatever the defendant held out, he knew that it was unsafe to travel with them open. It is also said that he was misled by people having been allowed to travel on the platform, or, that he had been put off his guard thereby. I again refer on this point to Slattery's case, where Lord Selborne, in his judgment, said: "The cases of *Wanless* (*a*), and *Bridges* (*b*) in this House—with which that of *Jackson* (*c*) is consistent — determined, as I understand them, that a man is not necessarily to be regarded as having caused or contributed to his own injury by getting out of a carriage or by crossing a line of railway in a manner *primâ facie* dangerous and imprudent—from which his death actually followed—if there is evidence of acts or omissions on the part of the Company by which he might have been put off his guard and led to suppose that he might safely act as he did." In *Davey* v. *The London and South Western Railway Co.* (*d*), Brett, M.R., in dealing with this question, used these words: "Now there was no evidence that on the

(*a*) 7 L.R., H.L., 12.
(*b*) L.R., 7 H.L., 213.
(*c*) 3 A. C., 193.
(*d*) 12 Q.B.D., 70.

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occasion when the accident happened the train was coming at an unusual or unsafe pace, but there was evidence that it did not whistle, and indeed it is admitted that it did not do so . . . . it was broad daylight, and the plaintiff himself admitted that if he had looked to the left up the line he must have seen the train coming. It seems to me impossible for any reasonable person to say otherwise than that he ought not to have crossed thus." Lord Bowen in that case also says: "It has been argued for the plaintiff that even if in this respect the plaintiff was negligent, still he might have been misled into doing what he did, but, as the Master of the Rolls pointed out, the question is not whether he was misled, but whether he was reasonably misled; whether it was possible for a reasonable man to have done what he did. In *Smith* v. *The South Eastern Railway Co.* (*a*), Lopez, L.J., said: "The deceased appears to have known the crossing and the practice there with regard to the signalling of trains. Was it not a question for the jury whether the deceased, finding that the signalman remained sitting in his lodge and making no attempt to signal the train, might not reasonably have supposed that he could safely cross the rails without taking the precaution of looking up and down the line, or listening for the whistle of a train." These and like cases shew that the injured person was misled or put off his guard by some act or omission of the defendant. In this case the plaintiff could not have been misled or put off his guard by the defendant's negligence in leaving the gate open. He knew it was more often open than shut, and this made it incumbent upon him, as a sentient being, to see that it was closed, and if not to close it when the train started, or to go into the carriage. With regard to the case of *Whitchurch* v. *The Commissioner of Railways* I can see no distinction between that case and this. True, in that case there was evidence that Whitchurch was stooping at the time he was on the platform, but I do not know that the fact of his stooping rendered him more negligent than was the plaintiff in this case, and between Whitchurch and the open gateway there were, I think, two persons who should have been some protection to him. In my opinion, therefore, the injury to the plaintiff was caused by his own want of ordinary care, and the learned Chief Justice should have directed the jury to find for the defendant. Consequently, I think, the verdict should be set aside and judgment entered for the defendant.

Solicitor for appellant: *Crown Solicitor.*

Solicitors for respondent: *Jones, Smith & Norris.*

(*a*) (1896), 1 Q.B., 178.

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